IIUSA Regional Center BUSINESS JOURNAL

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IN THIS ISSUE:

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Letter from the Editor

Dear Readers,

Thank you for reading the fall 2024 edition of the *Regional Center Business Journal*. Two and half years into the RIA, this edition tackles many topics that demonstrate how, despite the RIA no longer being "new," the EB-5 industry is still learning, adapting, and evolving to the changes brought forth from the statute.

Additionally, with just two and a half years until the next reauthorization, the EB-5 industry is already looking to what this means for 2025 and beyond. Navigating what does in fact still feel like a new law, EB-5 stakeholders are simultaneously gearing up for the political and policy challenge of 2027's reauthorization deadline.

As the chair of the IIUSA Editorial Committee, I hope you enjoy the thoughtful articles in this edition. Thank you to the authors for their time to write and the members of the Editorial Committee for their tireless effort to bring this publication to life.

We welcome ideas for articles for our future editions. Feel free to contact me directly or email **education@iiusa.org** with your thoughts. Additionally, if you are interested in joining us in our work on the Editorial Committee, we would love to have you.

Thank you again for reading. I hope you enjoy reading this edition.

Sincerely,

Osvaldo (Ozzie) Torres
Editorial Committee Chair
IIUSA *Regional Center Business Journal*

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Coordinating Conversation with USCIS:

IIUSA's Advisory Committee Bill

Aaron Grau
Executive Director | IIUSA

George McElwee
Co-Founder & Managing Partner | Commonwealth Strategic Partners

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IIUSA has long wanted to establish better communications with the United States Citizenship and Immigration Services (USCIS). As IIUSA's members know, meaningful communications with USCIS are non-existent. After much discussion and exploration on possible solutions, IIUSA conceived the idea to pursue better communications with USCIS by having Congress establish a federal advisory committee.

After many drafts and exchanges of information with IIUSA, this past February, Congressmen Greg Stanton (D-AZ-4), Brian Fitzpatrick (R-PA-1), Lance Gooden (R-TX-5), and Dwight Evans (D-PA-3) introduced bipartisan legislation, **H.R. 7220, EB-5 Regional Center Program Advisory Committee Authorization Act**. This legislation intends to break the communication log jam with USCIS and provide a better path forward for the EB-5 ecosystem (regional centers, mayors, state and county economic development officers, and representatives from the U.S Department of State and U.S. Department of Commerce).

IIUSA was seeking a mechanism to allow our members the opportunity to engage USCIS and to ensure that the industry could participate in meaningful meetings and dialogue with the agency. Establishing a federal advisory committee via legislation is one tool that IIUSA identified to achieve improved communications. Advisory committees, which have been used successfully in efforts like this in the past, not only give the public and industry partners a seat at the table with an agency, but they also assist Congress with policymaking via the recommendations offered at required mandatory meetings. Since the committee is established by Congress, the committee is responsible for reporting back to Congress on their progress and the agency is held accountable.

At IIUSA's urging, H.R .7220, EB-5 Regional Center Program Advisory Committee Authorization Act, would establish an advisory committee composed of experts in the EB-5 Regional Center Program space. The advisory committee, hosted by USCIS, will bring together Regional Center owners, and state and local officials to communicate, coordinate, and advise UCSIS on administering the Regional Center Program. Regional Centers sitting on the Committee would be capable of interacting directly with the USCIS EB-5 leadership.

While USCIS has facilitated several "listening sessions" and appeared to field questions about the Regional Center Program's operations, these engagements fall short of meaningful dialogue. For those IIUSA members who have had opportunities to work with other federal agencies, USCIS's reluctance to engage, answer questions, or effectively promulgate rules is anomalous. Their decision to function in their own silo is outside the norm.

USCIS's decision to remain closed to stakeholders is seemingly based on its misinterpretation of section 107 of the Reform and Integrity Act. Section 107(a) mandates that USCIS shall act impartially and may not give preferential treatment to any entity, organization, or individual in connection with any aspect of the immigrant visa program described in section 203(b)(5) of the Immigration and Nationality Act (8 U.S.C. 1153(b)(5).

While this mandate at first glance seems broad, in reviewing the complete text, it becomes clear that the focus of section 107 is to prohibit case-specific preferential treatment to specifically defined EB-5 program beneficiaries and to ensure that more general information about the Program's administration which is provided to specific stakeholders also be shared promptly with the industry at large. In recognition of this prohibition, HR 7220 specifically states that, *"[t]he Advisory Committee shall not make any petition or case-specific recommendations to the program…"* What is decidedly not prohibited by the RIA's section 107 is communicating, meeting, or engaging with individuals, industry stakeholders and industry associations seeking to engage the agency on policy guidance[1].

The advisory committee's primary task is to, "*advise, consult with, report to, and make recommendations to the Director of U.S. Citizenship and Immigration Services regarding the EB-5 Regional Center Program.*" Such recommendations are not required to be taken, but they are a matter public record and they, along with the professional deliberations and conversations had to make them are a precise reason the bill was introduced in the first place: "meaningful communications."

IIUSA earnestly believes that meaningful dialogue, in which USCIS and the EB-5 stakeholders have mutual respect and can exchange ideas without the specter of lawsuits, is a better path forward for the EB-5 ecosystem. The advisory committee can facilitate not only dialogue, but also a new relationship between USCIS and EB-5 stakeholders that shares the goals set out by Congress, i.e. economic development and job creation. With reauthorization of the EB-5 Regional Center Program not too far off, the legislation states that the advisory committee will be in place, "notwithstanding any lapse or termination of the EB-5 Regional Center Program," to assure that USCIS has the benefit of clear guidance during times when it would arguably need it most.

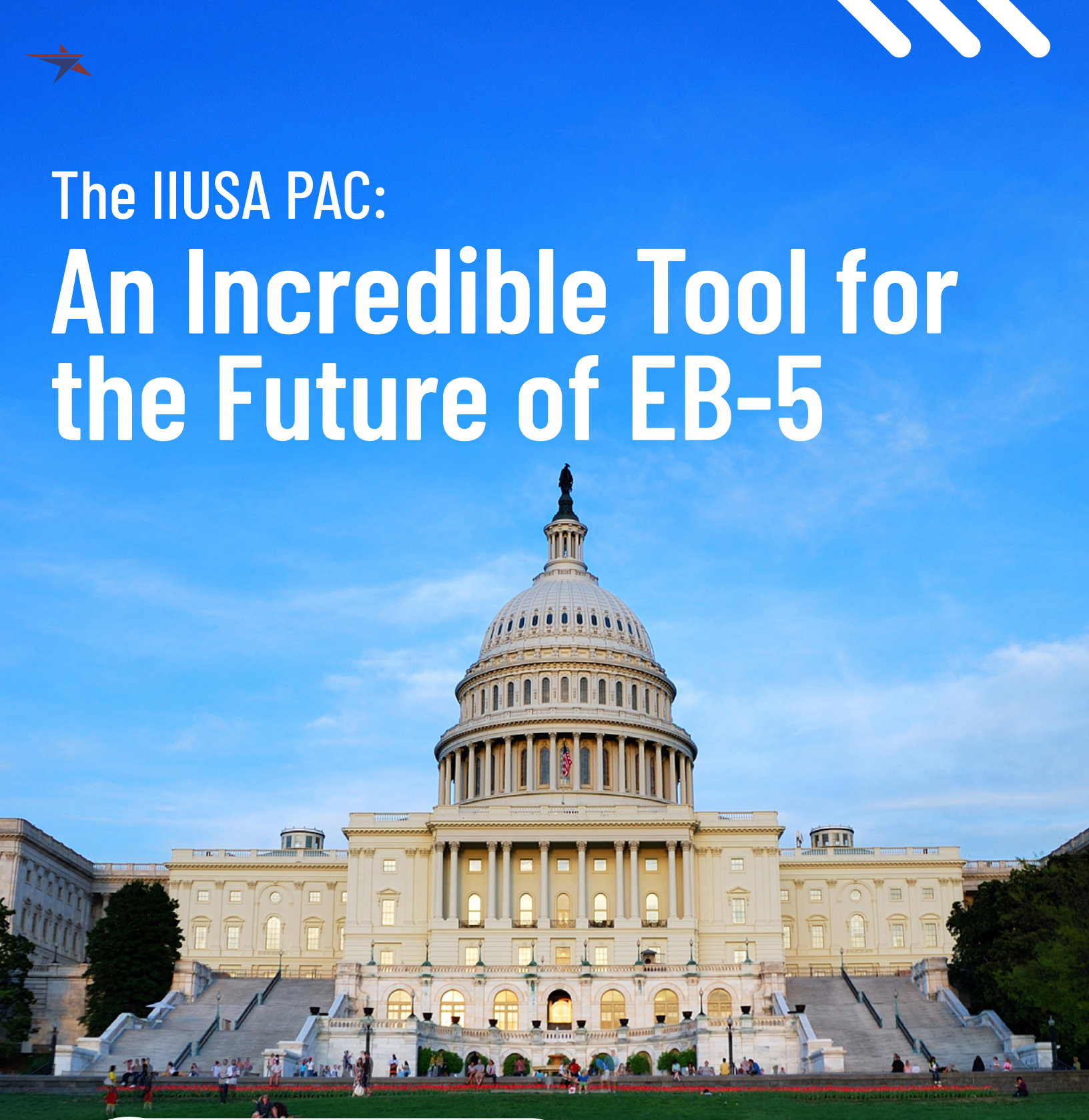
Due to numerous factors, it is unlikely that the legislation will be acted on before the end of the 118th Congress. The bill will be reintroduced next Congress and one of IIUSA's asks of Congressional offices will be to lend their support as a cosponsor and also to have a Senate companion bill introduced. This has been a focus of our three advocacy days on Capitol Hill this year and IIUSA will continue its work to educate policymakers about the benefits of EB-5 and what is necessary to protect this program and make it work better.

HR 7220 is a sound, good-government, bi-partisan public policy that would finally deliver meaningful communications with USCIS. It is born out of a sincere desire to make the EB-5 Regional Center Program function better for everyone involved: investors, regional centers, and yes, USCIS.

If you would like more information about HR 7220 or the legislative process, please contact IIUSA's executive director, Aaron Grau at **aaron.grau@iiusa.org** or IIUSA's lobbyist, George McElwee at **gmcelwee@commonwealthstrategic.com**.

[1] The authors recognize and thank Carolyn Lee and Lulu Gordon for their analysis of section 107

The IIUSA PAC:
An Incredible Tool for the Future of EB-5



Robert W. Kraft
Chairman & CEO, FirstPathway Partners | IIUSA PAC Board President | IIUSA President Emeritus

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A BIG STEP

This year, as part of its ongoing effort to strengthen its presence on Capitol Hill, flatten the EB-5 learning curve for federal legislators, and identify and support an expanded number of EB-5 champions, IIUSA created a federal political action committee (PAC) called the IIUSA PAC. Establishing and managing a PAC requires attention to details, awareness of federal rules, and a willingness among an association's members to participate and support the PAC. The IIUSA Leadership Circle and board of directors took these realities into account, debated the pros and cons of taking this step, and ultimately decided the benefits far outweigh the concerns or necessary diligence. I believe they are right.

Political action committees are formal organizations committed to supporting political candidates who reflect a PAC's priorities and values. A PAC receives voluntary financial contributions from those permitted to provide them and uses that money to support selected political candidates. Every PAC must register with the Federal Election Commission (FEC) and follow specific rules regarding how (and to whom) they solicit contributions to their cause and how they make contributions to candidates. IIUSA elected to file its new PAC with the FEC as an "affiliated PAC." Specifically, IIUSA PAC is "affiliated" with IIUSA, a 501(c)(6) business league/trade association. This type of registration allows IIUSA (the corporate non-profit) to pay for IIUSA PAC's administrative costs such as IIUSA PAC related events and a separate dedicated accountant to handle the IIUSA PAC's distinct bank account and all necessary FEC filings. Permitting IIUSA to budget for and underwrite these costs assures 100% of contributions IIUSA PAC receives are provided to its selected candidates.

In exchange, however, rules governing "affiliated" PACs require certain thresholds be met before they are fully functional and demand specific restrictions on how funds are solicited. IIUSA and IIUSA PAC take these rules very seriously and closely monitor any PAC related activities to be sure the association and its affiliated PAC remain compliant.

FULLY FUNCTIONAL

FEC rules limit the amounts PACs can contribute to both of candidates' elections (primary and general elections). The chart below illustrates the difference between multicandidate PACs' limitations and non-multicandidate PACs' limitations. The top line lists the entities to which a PAC may give money. IIUSA PAC is focused on the first column: contributions to "Candidate Committee per Election." Note multicandidate PACs can provide $1,700 more to a candidate's primary election and again to a candidate's general election.

Contribution Limitations: Multicandidate v. Non-Multicandidate[1]

For 2023-24 Elections	Candidate Committee per Election	PAC (SSF & Nonconnected per year)	State, District & Local Party Committee per Year	National Party Committee per Year	Additional National Party Committee Accounts per year
Multicandidate	$5,000	$5,000	$5,000 (combined)	$15,000	$45,000
Non-Multicandidate	$3,300	$5,000	$5,000 (combined)	$41,300	$123,000

To become a multicandidate PAC and therefore more impactful, a PAC must pass three milestones.

1. It must have received contributions from at least 51 persons.
2. It must have been registered with the FEC for at least six months; and
3. it must have made contributions to at least five federal candidates.

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[1] Federal Election Commission, FECTube: FedConnect OnDemand

The IIUSA PAC was established and registered with the FEC in February 2023. Therefore, it meets the six-month milestone. Further, the IIUSA PAC has already made contributions to three candidates: Congressman Brian Fitzpatrick (R-PA-01), Congressman Greg Stanton (D-AZ-04), and Congresswoman Maria Salazar (R-FL-27). Therefore, the IIUSA PAC need only contribute to two other candidates. Finally, the IIUSA PAC has received contributions from 20 separate people, leaving 31 to go before meeting the final requirement to become a multicandidate PAC.

The IIUSA PAC is very grateful to each of its contributors. Although contributions to a PAC must be personal (corporate contributions ae not allowed), they can be of any amount ($1 to $5,000) to help a PAC reach its 51-contributor threshold.

SOLICITING FUNDS

Any PAC may only solicit and receive contributions from individuals. FEC rules do not allow corporate contributions. An "affiliated" PAC may only solicit and receive contributions from those people in its "restricted class" and even then, only from those within the restricted class who give permission to be solicited.

The FEC defines "restricted class" for an affiliated PAC as: noncorporate members (such as individuals and partnerships) of the association;
the association's executive and administrative personnel;
executive/administrative personnel and stockholders of member corporations (with prior approval); and
the families of all three groups.

"Prior approval" is exactly what it says. People in an affiliated PAC's restricted class may only be solicited if the IIUSA member with which they are associated or employed provides approval for said solicitations. As mentioned, IIUSA and IIUSA PAC take these rules very seriously and therefore only solicit people in its restricted class after their employer submits the association's prior approval form.

The form, available on the IIUSA website, grants IIUSA PAC permission "to solicit and accept contributions from employees of [our] firm and that permission to do so may be withdrawn at any time." In other words, IIUSA and IIUSA PAC seek permission to solicit the "executive/administrative personnel and stockholders of [its] member corporations" before asking for any contribution. Although providing a prior approval form in no way requires anyone to make any contribution, no person who has not submitted the form or whose employer has not done so will be asked to contribute to the IIUSA PAC. To date, 27 IIUSA association member organizations have provided their approval.

THE VALUE & OUR PROGRESS

Anyone can make a political contribution to any candidate they choose. The value a PAC contribution brings is its stated priorities and values. For example, if Citizen Kane contributes $2,000 to a candidate the candidate must report that contribution to the FEC and Mr. Kane's name will be listed in FEC records. However, few people will know why Mr. Kane made his contribution or where he stands on any issue.

When IIUSA PAC makes a $2,000 donation to a candidate the contribution is also reported to the FEC. It also becomes a matter of public record, but rather than simply being tied to one person, the contribution is tied to an organization with stated priorities and policy goals. Candidates that accept PAC contributions understand this and consequently try not to accept campaign funds from organizations with which they do not agree. We can expect, therefore, that the more candidates IIUSA PAC supports, the more support IIUSA can expect.

As stated, IIUSA PAC has already contributed to three candidates. Representatives Fitzpatrick and Stanton were the RIA's House of Representatives co-sponsors. Representative Salazar introduced the Dignity Act, a bill that eliminates derivative visa counts and limits processing wait times to 10 years.

As the IIUSA PAC grows, becomes more involved in federal candidates' efforts, and can support more candidates with more meaningful contributions (as a multicandidate PAC), more people, candidates, and their staff, will become more aware of EB-realities: the powerful economic development and job creation it provides and the investors and regional centers face. Sharing that information will underpin a more informed Congress, one which IIUSA will soon ask for a new reauthorization, if not permanent authorization. To this very critical end, the IIUSA PAC is an incredible tool off to an incredible start.

IIUSA PAC

If you'd like to know more about the IIUSA PAC, please send a message to IIUSA's Executive Director, Aaron Grau at **aaron.grau@iiusa.org**. If you are a member of IIUSA and would like to review the IIUSA PAC prior approval form, you can do so here.

A Tribute to Our Friend Nima Korpivaara

Phuong Le
Partner | KLDP, LLP

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All of us at KLD are thankful for this outlet to pay tribute to our friend and partner, Nima. To be honest, while we were hesitant at first because this is a deeply personal matter for us, we realize that while he was a partner and a friend to us, his impact transcended our firm and he shared a bond, a friendship with many people in this industry. As a long-time supporter of IIUSA and past contributor to the Regional Center Business Journal, we take this opportunity to remember Nima.

It's a bit surreal but I've known Nima for more than a quarter of my life. I first met Nima over a decade ago. He actually interviewed and hired me, which some days I'm sure he probably regrets.

Those of you who are fortunate enough to be around Nima know that he was passionate about life and wanted to make the most out of each day. He dreamed big and was determined to bring everyone along for the ride. I remember when Nima, Niral, and I were planning to open an office in NY. We tried to be professional adults and agreed on a reasonable budget. Of course, Nima immediately chose an office that was 5 times more than what we agreed upon. (I've never seen someone so excited to choose an office that he was probably going to visit two days a month.) His very Nima explanation for this was if we didn't think our firm would be here in a year, we might as well not do at all. We might as well not have a firm. He was right of course. It taught me two things about him. One, this guy's idea of budgeting was to make more money. And two, for Nima, life and business wasn't worth it unless you could give it your all.

Of course, most of you knew him from his day job. He was a brilliant attorney, never afraid to voice his opinion and defend it. Where most people took the comfortable road, Nima delighted in splashing around the grey areas and being right before everyone else. And reminding you of it. He had a knack for distilling the most complex subjects into brilliant one liners. Both insightful and very much a smartass. I can't think of anyone else who said more with less words than Nima.

He had a magnetic personality and energy that drew people to him. People that loved Nima really loved him. People who didn't like Nima hated him because they loved him anyways. We've had numerous clients who couldn't stand Nima or thought he was a grumpy but still hired him anyways.

It's because they, like us, knew Nima cared and that he'd be honest with them. Nima was always there to give advice -- unfailingly direct and straightforward. You turned to Nima not because you wanted to hear nice things. You turned to Nima because you wanted honest advice, good advice, and the truth because he would always tell you what's best for you, not what you wanted to hear. Love him or hate him, you knew he was always going to call it exactly as he saw it.

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And as lovingly abrasive, arrogant, and cocky as he was at times, if you were fortunate enough to be in his life you knew Nima cared deeply about those around him. Whether you were a client who trusted him or a friend that turned to him for guidance beneath the grumpy exterior Nima had a big heart. He cared. And while you may never know where he'd be in the world at any given moment, whether it'd be skiing in aspen, vacationing in the south of France, or having a vegetarian lunch with Buddhist monks in Cambodia, you knew he was always there when you reached out to him, at any hour.

Though he's no longer with us, I don't look back at our time with sadness. I feel fortunate, I feel lucky to share so many memories with him. We've traveled around the world, grew up together, celebrated victories and milestones, and even stared this firm in the parking lot of an Italian restaurant. In Nima's words, we did a lot of cool shit together. I'm at peace knowing the guy lived his best life. In 42 short years Nima experienced and accomplished more than most of us will in a lifetime. And knowing him, he's probably annoyed that he could've done more. But hey, that's how he is. There will never be another Nima. A true one of one. Maybe that's a good thing because I can only deal with one Nima in my lifetime.

Through it all, Niral, Eric, and I will continue to grow KLD. Both to honor Nima's memory and legacy, but also because we don't want him complaining and trash talking us from heaven. I can only imagine what he'd say. "What the hell. I've only been gone for a few months and this is what happened?" No man, if you're looking down at us you know we continue to accelerate and we're stronger than ever. While I wish you were here to celebrate our victories in the past month, there will be many more and we'll push on for you.

While it hurts to say goodbye, I'm glad that you're finally at peace in heaven. Nima. I miss you. I love you. Til we meet again, rest in peace my friend.

What Are The Consequences And Remedies

For Failure to File A Form D With The Securities and Exchange Commission

Catherine D. Holmes
Partner; Chair - Investment Capital Group | Jeffer Mangels Butler & Mitchell

Over the last several months, USCIS has issued Requests for Evidence ("**RFEs**") on Forms I-956F that include a new deficiency item with respect to offerings of securities by new commercial enterprises ("**NCEs**") who failed to file a Form D with the Securities and Exchange Commission ("**SEC**") as required by SEC Regulation D. Almost all NCEs rely upon SEC Regulation D ("Regulation D") for sales of securities to immigrant investors who reside in the U.S. at the time of their offerings, so this is an issue that impacts virtually all NCEs. This article provides practical advice regarding what happens if an NCE fails to timely file a Form D and how the NCE can remedy that situation.

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WHAT IS A FORM D AND WHEN IS IT REQUIRED TO BE FILED?

A Form D is a brief, fill-in-the-blank form that is filed with the SEC in connection with an offering of securities in reliance on Regulation D. Regulation D provides an exemption from registration of offerings of securities under the Securities Act of 1933, as amended (the "**Securities Act**") for private offerings that comply with the requirements of Regulation D. One of those requirements, as stated in SEC Rule 503, is the filing of a Form D notice filing with the SEC no later than 15 calendar days after the first sale of securities in the offering. Rule 503 requires that a Form D be filed via the EDGAR electronic filing system and be signed by an authorized person. Additionally, an NCE must amend a Form D (i) to correct a material mistake of fact or error; or (ii) to reflect a change in certain information provided as soon as practicable after that change (which does not include certain specified changes such as increases in the amount of securities sold from time to time); and (iii) annually on or before the first anniversary of the filing of the Form D or most recent amendment.

WILL A FAILURE TO FILE A FORM D CAUSE A LOSS OF THE EXEMPTION UNDER REGULATION D?

No, a failure to file a Form D will not cause a loss of the exemption under Regulation D. The SEC itself has stated that policy in its online Compliance and Disclosure Interpretations ("**C&DIs**") that provide interpretations of the rules adopted under the Securities Act. (*See: https://www.sec.gov/about/securities-act-rules.*) In Question 257.07, the SEC stated that:

> **"The filing of a Form D is a requirement of Rule 503(a), but it is not a condition to the availability of the exemption pursuant to Rule 504 or 506 of Regulation D. Rule 507 states some of the potential consequences of the failure to comply with Rule 503. [Jan. 26, 2009]"**

The above advice refers to SEC Rule 507 for a statement of the potential consequences of failure to file a Form D. A review of Rule 507 indicates that the primary consequence is a potential future restriction on the use of Form D if any order, judgment, or decree of any court of competent jurisdiction temporarily, preliminary or permanently enjoins the issuer, any of its predecessors or affiliates from failing to comply in the future with Rule 503. This means that the SEC could take action against an issuer and seek to enjoin it from future use of Regulation D under Rule 507. For that reason, it is important that NCEs file Form Ds to avoid possible enforcement action by the SEC, which could cause the issuer to lose the right to use Regulation D for future offerings. However, in practice, the SEC has not taken enforcement actions against issuers for violation of Rule 503 unless the issuer has engaged in other, more egregious violations of the securities laws, such as fraud.

HOW DOES A FAILURE TO FILE A FORM D IMPACT STATE SECURITIES LAW EXEMPTIONS?

Regulation D provides that securities issued under the Regulation D exemption are "covered securities" that are not required to be registered or qualified under the laws of the states. The SEC has stated in its C&DIs that an issuer's failure to file a Form D will not cause its securities to lose their designation as "covered securities" exempt from registration or qualification under the securities laws of the state. In Question 257.08, the SEC stated that:

> **"A "covered security" under Section 18 of the Securities Act is defined to include a security with respect to an offering that is exempt from registration under the Act pursuant to SEC rules or regulations issued under Section 4(a)(2) of the Act. Rule 506(b) was issued under Section 4(a)(2) of the Act; Congress determined in the JOBS Act that Rule 506(c) would be treated as a regulation issued under Section 4(a)(2). Filing a Form D is not a condition that must be met to qualify for the Rule 506 exemption. [Sept. 20, 2017]"**

Although states cannot require registration or qualification of "covered securities" under Regulation D, they are allowed to require notice filings and filing fees for sales of securities made in their state. Not all states require notice filings or filing fees, but most do, and the filings are generally required to be made within 15 days of the first sale in the state, although some states require filing before the first sale. An issuer should advise its securities attorney or filing service of the first sale made in each new state to determine the requirements for filing in that state.

HOW CAN AN ISSUER CURE A FAILURE TO FILE A FORM D WITH THE SEC OR A NOTICE FILING WITH A STATE?

An issuer that fails to file a Form D within the time required by Regulation D can still file a Form D later, even years later, than the offering for which the Form D is being made. Therefore, an NCE responding to an RFE from USCIS that includes a failure to file a Form D as a deficiency should file the Form D with the SEC as soon as possible and submit proof of filing to USCIS to establish that the issuer has corrected the deficiency. There are no penalties or late filing fees required for the late filing of a Form D with the SEC.

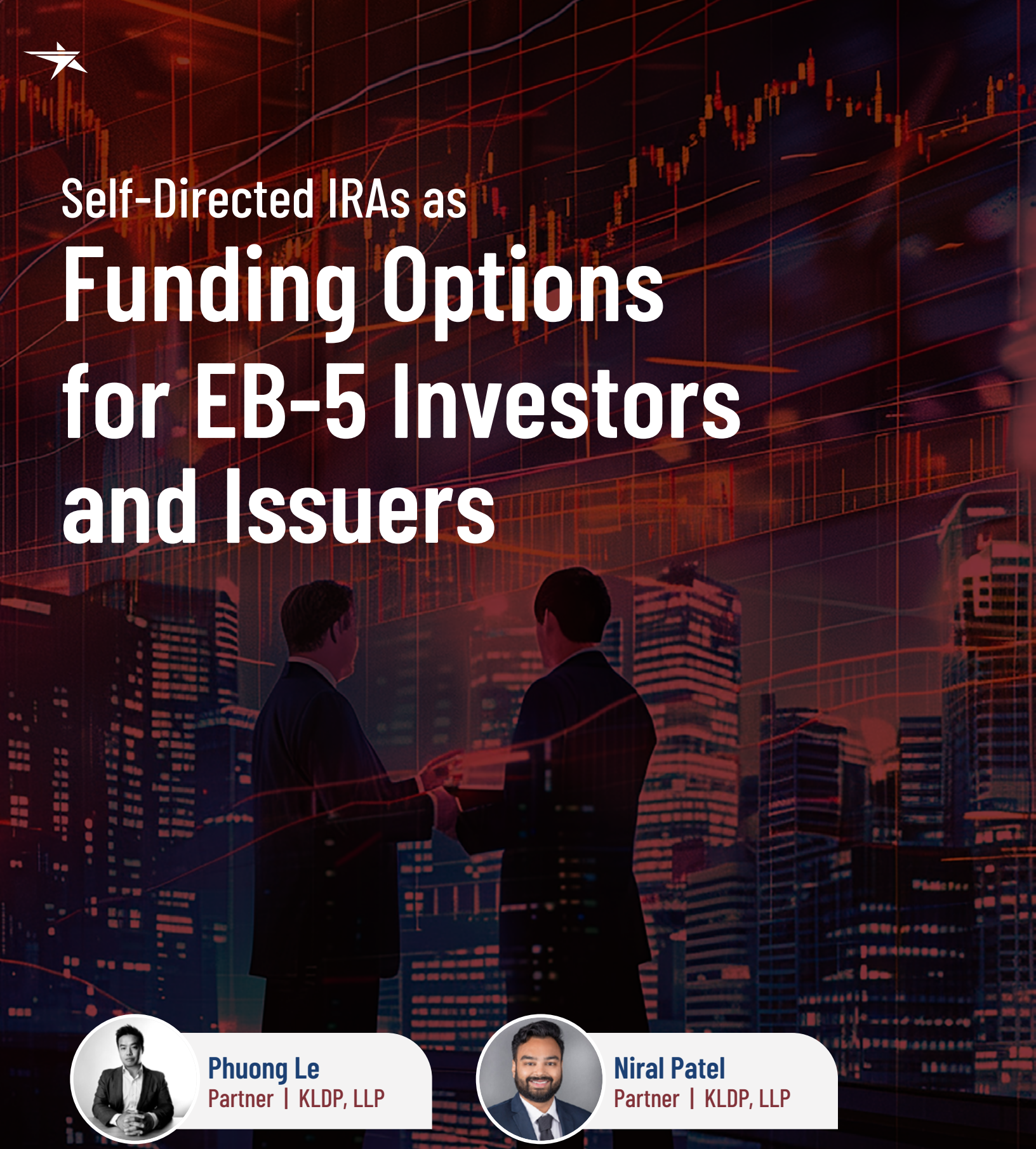
An issuer that fails to file a notice filing with a state for securities sold under Regulation D can also file the notice filing late and pay the filing fee. Some states do impose penalties and late fees on issuers who file late, including in some cases requiring annual fees for each year that the offering was open. However, it does not appear that states have taken any other enforcement action for late notice filings.

HOW DOES A FAILURE TO FILE A FORM D IMPACT APPROVAL OF AN EB-5 PROJECT BY USCIS?

Under the EB-5 Reform and Integrity Act of 2022 ("**RIA**"), Regional Centers are required to take appropriate actions to ensure that the NCEs whose offerings they sponsor are in compliance with all federal and state securities laws, among other requirements. By including the failure to file a Form D as a deficiency in RFEs, USCIS is putting Regional Centers and NCEs on notice that it will require all NCEs to provide evidence of the filing of a Form D for every EB-5 offering. In light of this development, every Regional Center and NCE should review their records to confirm that a Form D has been filed for every EB-5 offering in which they have been involved. If a Form D has not been filed, it should be filed late to demonstrate that appropriate actions were taken to evidence compliance with the requirements of Regulation D. A late filing of the Form D will not cause a loss of the securities exemption under Regulation D and should not be used by USCIS as reason to deny a Form I-956F.

Self-Directed IRAs as

Funding Options for EB-5 Investors and Issuers



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Partner | KLDP, LLP

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Once upon a time, structuring an EB-5 investor's source of funds was simple. Throughout most of the program's history, the majority of source of funds were based on secured loans, a sale of property, or income.

Unfortunately, it is no longer that simple. We are at a crossroads in the EB-5 program where there's a juxtaposition of an increased minimum investment amount, tied up assets, staggered liquidity, and tax issues. Not to mention, we still have to make sure the EB-5 program achieves the investor's desired immigration goals.

Recently, a new option has emerged - Self-Directed IRA accounts ("SDIRAs"). SDIRAs are a powerful funding option for many investors, both as a pool of lawful funds and for certain tax advantages. For investors and issuers alike, it's important for them to understand the nuances of pursuing and accepting SDIRAs because it may be the difference between an investor electing to subscribe or not.

Below we explore why SDIRAs have become an increasingly popular and viable option, the mechanics behind using them, and some issues to consider when implementing a plan to accept them.

WHAT IS AN SDIRA?

SDIRAs are similar to other retirement accounts such as a traditional IRAs, Roth IRAs, or a 401K plan. They are funded with the investor's income and the funds can grow with certain tax advantage. The biggest difference, however, is the amount of freedom and control over the menu of investment options in each account.

In a traditional retirement account, a custodian or broker typically decides what menu of investment options are accessible to an investor. That menu may be limited to a few mutual funds or target-date funds (such as your typical 401K provider), or it may be much wider and include publicly-traded stocks, bonds, and ETFs (such as an IRA account through Charles Schwab).

However, an investor generally cannot use these accounts to invest into an EB-5 offering since they are private placements and are not public securities. The reason why funds in an SDIRA can be used to invest into an EB-5 offering is because now the investor decides the menu of investment options available to them (rather than the broker, for example). This allows investors to invest within a larger universe of options, including precious coins, artwork, collectibles, and yes, EB-5 private placement offerings. Thus, by rolling over eligible funds into an SDIRA, an investor is in complete control and able to use SDIRA funds to invest into an EB-5 offering.

Of course, while an SDIRA is now a viable option, it may not be appropriate for every investor. There are costs and fees to set up and manage SDIRAs and investors can incur penalties if funds are not properly invested or managed. Investors are advised to consult with an appropriate financial or tax advisor if they are interested in this option.

SDIRAS AS APPROVABLE CUSTODIAL ACCOUNTS

At a high level, using an SDIRA as the source of an EB-5 transaction isn't complicated. SDIRAs are funded with lawfully-earned money and are owned by the investor in a custodial account. The investor owns and controls the account and directs all investment decisions in the custodial account, whether that be publicly traded stocks or private placements. For EB-5 investments, the custodial account would simply subscribe, on the investor's behalf, by signing subscription documents in the name of the SDIRA. Finally, it is important to understand that custodial accounts are not a new concept in EB-5 and in fact have been widely used by law firms and issuers for years for certain transactions.

We originally explored SDIRAs as a possible piece of the source of funds puzzle because investors often had trouble completing the entire $800,000 puzzle. It boils down to liquidity and tax-efficiency. Like most of us, it's not unusual for EB-5 investors to have a large amount of their money saved in a retirement account, whether that's a Traditional IRA, Roth IRA, 401K plan, etc. Until recently, using these types of retirement accounts for EB-5 this wasn't possible (largely because SDIRAs simply weren't a widely known option). However, by rolling other eligible retirement funds into a SDIRA, an investor can now use that entire amount as part of their source of funds for an EB-5 subscription. Thus, SDIRAs are ultimately part of a powerful set of tools advisors need to become familiar with in order to help their clients not only source their funds, but to help save them money and provide flexibility.

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PROCEDURAL ISSUES & PITFFALS TO CONSIDER

While we are advocates of using SDIRAs as a funding option, we'd caution investors and issuers to not blindly jump headfirst into setting up SDIRAs. Not all SDIRA providers and custodians are created equal. For investors, there are multiple issues to consider to ensure that it's structured properly, including, but not exclusive to, the following:

- **Ensure it's a Qualifying Rollover**: Investors should note that it is important to structure this as a qualifying rollover and not a withdrawal or distribution from their retirement accounts. Failure to do so would result in funds being taxed as ordinary income and possibly subject to additional early withdrawal penalties.
- **401K Plans and Conversions to SDIRA:** Investors should check with their 401K custodian to see whether it's possible to allow an in-plan conversion to an SDIRA. Some give maximum flexibility and have SDIRA options built into their plans, though many won't allow that conversion unless one leaves the company.
- **SDIRA and Subscribers:** Although funds earned by a couple through marriage are generally considered jointly owned, it's not necessarily the case when it comes to claiming the same treatment for subscriptions. Talk closely with your attorney and issuer to ensure that the right SDIRA and subscriber is used if it's a married couple.
- **SDIRA Doesn't Impact 401K Loans:** Keep in mind that while SDIRAs may only be used for the subscriber, both spouses can still draw on 401K loans, assuming they qualify.
- **Whether SDIRA Custodian is Familiar with EB-5 Private Placements:** Beware that not all SDIRAs are created equally, nor do they allow the same level of flexibility. If your SDIRA custodian doesn't allow you to invest in private placements (such as EB-5), then this effectively eliminates this option. For example, some of the more popular brokerage firms that supposedly provide SDIRA options limit investors from investing into EB-5 offerings (e.g., Fidelity). Please make sure that your custodian is familiar with EB-5 offerings.
- **Whether the Regional Center, Issuer, or Law Firm is Familiar with SDIRAs:** Not all regional centers, issuers, or law firms are experienced or comfortable with using SDIRAs as a funding mechanism. Those who are new should familiarize themselves with these options before advising clients. Otherwise, there is a risk that the investment could be improperly structured. Specific side letters and subscription documents are needed for SDIRA investments to be properly attributed to the investor (and, as such, it is critical to seek proper advice to ensure they are structured correctly on both the SDIRA and issuer side).

CLOSING THOUGHTS

Incorporating SDIRAs into an investor's funding strategy is part of the ongoing evolution of creatively structuring investments to help investors reach the minimum investment amount of $800,000. It demands both attorneys and regional centers evolve and work closely with investors to help them structure tax advantaged and efficient funding plans. As one of our investors happily remarked just this week, "SDIRA, RC loans, 401k loans, and other loans are all approved at this point. This is big!! This makes it much easier for folks to reach the 800k mark. Many thanks to the RCs and Attorneys pushing the boundaries and making this possible."

Indeed, we couldn't agree more. In reality, SDIRAs have become part of our toolbox to construct an investor's sensible funding strategy that bridges immigration, investment, and tax goals. For example, instead of advising an investor to sell a house, we may advise them to file based on a partial investment; then six months later, bridge that minimum investment gap by taking out a 401K loan, exploring whether it makes sense to take out a margin loan on (or possibly sell) their restricted stock units (RSUs), and then creating an SDIRA to fill out the remainder of their investment. This allows investors to lock in their priority date, get the clock ticking on the processing of their Employment Authorization Document and Advance Parole document, and decide later whether to stagger the tax hit of liquidating any RSUs by spreading them out over two years.

It's important that, as an industry, we eventually move to normalize these concepts and educate ourselves, and clearly lay out these strategies and why they're acceptable to USCIS. EB-5 is difficult enough already – there's no need to remain burdened by traditional and perhaps dated source of funds avenues. We certainly advocate for evolution, education and working together with industry stakeholders and USCIS to ultimately accomplish investor goals.

Review of USCIS I-829

Denials in Removal Proceedings

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The I-829 petition is the final step in the EB-5 visa process—its approval is what removes the "conditions" on residency obtained following the United States Citizenship and Immigration Services' (USCIS) approval of an I-526 petition, and the investor obtaining conditional lawful permanent residence (a conditional "green card"). But what happens after an investor's I-829 petition is denied by USCIS? What happens after USCIS denies an I-829 petition, and what can investors do when a denial occurs? In this Question & Answer (Q&A), we address these and related issues.

Q: What happens if an I-829 petition is denied by USCIS? Do I lose my Conditional Green Card status?

A: The boilerplate language on an I-829 denial is scary—it says that the investor's "conditional permanent resident status is terminated," and that "all rights and privileges…derived from that status, including the right to work in the United States, are terminated as of the date of this letter."

But this is not quite right. USCIS's own Policy Manual makes clear that USCIS's denial of an I-829 petition does not result in the immediate loss of conditional residency (conditional "green card" status); rather, following an I-829 denial, USCIS will continue to issue "the immigrant a temporary Form I-551 until an order of removal becomes administratively final."[1] And, as USCIS states, "[a]n order of removal is administratively final if the decision is not appealed or, if appealed, when the appeal is dismissed by the Board of Immigration Appeals (BIA)." These "temporary I-551 stamps" are placed in the investor's passport, are generally valid for 6 months to one year, and are evidence of conditional residence—including "evidence of status for travel, employment, or other purposes."[2]

Note, even though the investor and family members still have a green card, airlines, Customs agents, and even some USCIS employees do not understand that fact because they have limited exposure to pending I-829 petitions. While you remain eligible to travel with your I-551 stamp, consult with an immigration attorney beforehand. We have seen investors get stuck outside of the U.S. for extended periods because CBP officers or airlines do not understand their documents.

Q: Can an investor challenge an I-829 denial with USCIS?

A: If an I-829 petition is denied by USCIS, an investor can file a motion to reopen and/or a motion to reconsider the decision using Form I-290B. A motion to reopen is appropriate if the investor has new evidence that overcomes the basis for the denial[3]. For example, if the I-829 petition is denied on the basis that the project failed to create the requisite jobs, and the investor obtains new evidence of job-creation, that can be submitted to USCIS through a motion to reopen. A motion to reconsider, on the other hand, argues that USCIS's denial was wrong based on the record that existed at the of the denial. A successful motion to reconsider must show that USCIS violated law or policy in its adjudication and that the decision was incorrect based on the previously submitted evidence[4]. Where appropriate, investors can file a "combined" motion to reopen and reconsider in a single filing.

Through FOIA litigation, we learned that motions to reopen and reconsider are generally assigned to the same officer who decided the case originally. Thus, unsurprisingly, investors face an uphill battle in reversing an I-829 denial through a motion. But if the evidence or arguments are compelling, motions can be successful in convincing USCIS to reverse course.

A motion to reopen or reconsider can also be used to supplement the record for future proceedings in immigration court or federal court, although you will have an opportunity to submit additional evidence in removal proceedings.

Note that appeals to the Administrative Appeals Office ("AAO") are not available for I-829 denials as they are for I-526 and I-526E petition denials.

Q: Can an I-829 petition denial be challenged in immigration court?

A: Yes—if the investor is placed in removal proceedings.

By regulation, the Government is supposed to place investors (and their dependents) into "removal" (deportation) proceedings before the Executive Office for Immigration Review (EOIR) (immigration court) after USCIS denies the I-829 petition.[5] In reality, it can take many months or years for the Government to do so—if they ever do so at all.

Removal court proceedings begin with the Department of Homeland Security issuing a "Notice to Appear"—an immigration charging document—and serving it on the investor and the immigration court. The investor and his or her derivative dependent family are then scheduled for a hearing with the immigration court that has jurisdiction over the area where they live. The Government cannot, however, be forced to put someone in removal proceedings.[6]

Importantly, the law gives investors the right to ***renew*** their I-829 petition in immigration court.[7] In these court proceedings, the Government has the burden of proving that the I-829 petition was properly denied.[8] This is a substantial difference from filing with USCIS, where the petitioner has the burden of proving eligibility. And the immigration judge rules on the petition "de novo" without deferring to the factual findings and legal conclusions that USCIS made when it denied the I-829 petition.[9] These factors are generally favorable to the investor. In these court proceedings, the investor can submit new evidence, including forensic accounting reports, updated economic impact analyses, and expert testimony. Where appropriate, investors issue subpoenas to government adjudicators and economists, and can call witnesses—including experts—to testify on contested issues of fact; the

[1] 6 USCIS Policy Manual, Pt. G, Chap. 7, § Dn.
[2] 6 USCIS Policy Manual, Pt. G, Chap. 7, § D; see USCIS Policy Alert, PA-2018-02 (May 2, 2018); see also CBP, Carrier Information Guide: United States Document Requirements for Travel at 2, 6, 34 (Oct. 2023) (listing "Temporary Resident Stamp ('ADIT') contained in a passport or on Form I-94" as sufficient alone to prove U.S. permanent residence, providing an example of an ADIT stamp, and explaining that an LPR "may re-enter the United States with a valid ADIT Stamp. The stamp is provided to residents as temporary evidence of their status")
[3] See 8 C.F.R. § 103.5(a)(2).
[4] See 8 C.F.R. § 103.5(a)(3).
[5] 8 C.F.R. § 216.6(d)(2).
[6] 8 U.S.C. § 1252(g).
[7] 8 U.S.C. § 1186b(c)(3)(D).
[8] Id.; see 8 C.F.R. §§ 1216.6(d)(2), 216.6(d)(2).
[9] Matter of Herrera Del Orden, 25 I. & N. Dec. 589 (BIA 2011).

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Government can do so as well.[10] The adjudication of the I-829 petition in immigration court proceedings, therefore, is very different from the paper-driven adjudication USCIS conducts. There is an actual trial, and the government is represented by an immigration prosecutor. There is the possibility of settlement and moving the court to approve the I-829 petition. And, as previously discussed, there is the right to a direct appeal to the BIA.

Q: Can the investor pursue other forms of relief in immigration court?

A: Yes. If an investor is placed in removal proceedings after an I-829 USCIS denial, other forms of immigration relief may be available. Asylum and related protections are one possibility. It may also be possible to seek a form of relief called "cancellation of removal."[11] If the I-829 petition is weak, and other forms of relief seem unpromising, it may also make sense to consider requesting "prosecutorial discretion"—a decision by the prosecuting authority not to pursue removal. This may result in the investor and his or her family maintaining conditional residency through temporary I-551 stamps indefinitely.

Whether these or other forms of relief are available must be evaluated at the time an investor and his or her family is placed in removal proceedings. However, if an investor knows in advance that the I-829 petition is not likely to be approved, he or she can work with his or her immigration attorney in advance to establish eligibility for other relief or make other immigration plans.

Q: What happens if the immigration judge denies the I-829 petition again?

A: If the immigration judge denies the I-829 petition (and other relief the investor may seek in removal proceedings), the investor can appeal the decision to the Board of Immigration Appeals (BIA). Only if the BIA also denies the case does the I-829 petition denial become administratively final and the investor loses their conditional residency in the United States.[12] However, in that circumstance, the investor can seek further review in a federal appeals court by filing a petition for review. Throughout this process, the investor's attorneys can continue negotiating with government attorneys to explore possible settlement options. If the petition for review leads to the I-829 approval, then the investor and the dependent family members revert back to unconditional lawful permanent residence status.

Q: Can the I-829 denial be challenged in federal court?

A: Historically, investors have had success challenging I-829 denials through challenges in U.S. federal district court.[13] Over the past several years, however, the Government has been responding to such lawsuits by placing investors in removal proceedings and arguing to the federal court that it lacks authority to decide the I-829 petition since the immigration court can decide the case. This has made pursuing litigation in federal court less attractive now than it once was. The jurisdictional issues, however, have not been definitively decided by the courts of appeals, and such lawsuits remain possible. Whether such a lawsuit is a good strategy will depend heavily on the facts of the specific I-829 denial as well as the investor's appetite to fight their case in multiple venues. N.B- while USCIS is normally very slow in initiating removal proceedings upon the denial of an I-829, filing a complaint in district court virtually guarantees that USCIS will issue an NTA in short order. Thus, the decision to file a complaint isa strategic one that needs careful consideration. It will likely speed up the outcome- good or bad, while not filing a complaint may give an investor many more years of conditional resident status before anything happens.

Q: Should an investor pursue other forms of immigration status?

A: Clients sometimes ask us whether it makes sense to pursue H-1B status, an F-1 visa, or other nonimmigrant visas following an I-829 petition denial. Our answer is almost always "no"; as noted above, an EB-5 investor remains a conditional resident until an immigration judge—or the BIA, if the immigration judge's decision is appealed—enters a final order of removal against the investor. And that can take many years. In nearly all cases, it makes no sense to give up that conditional permanent residency for a temporary nonimmigrant visa.

What does make sense is to pursue other possible avenues to obtain another green card or lawful permanent residence, through investment or other avenues This could also include employment-based visa sponsorship, or if the investor or dependent marries a U.S. citizen or lawful permanent resident, family-based sponsorship.

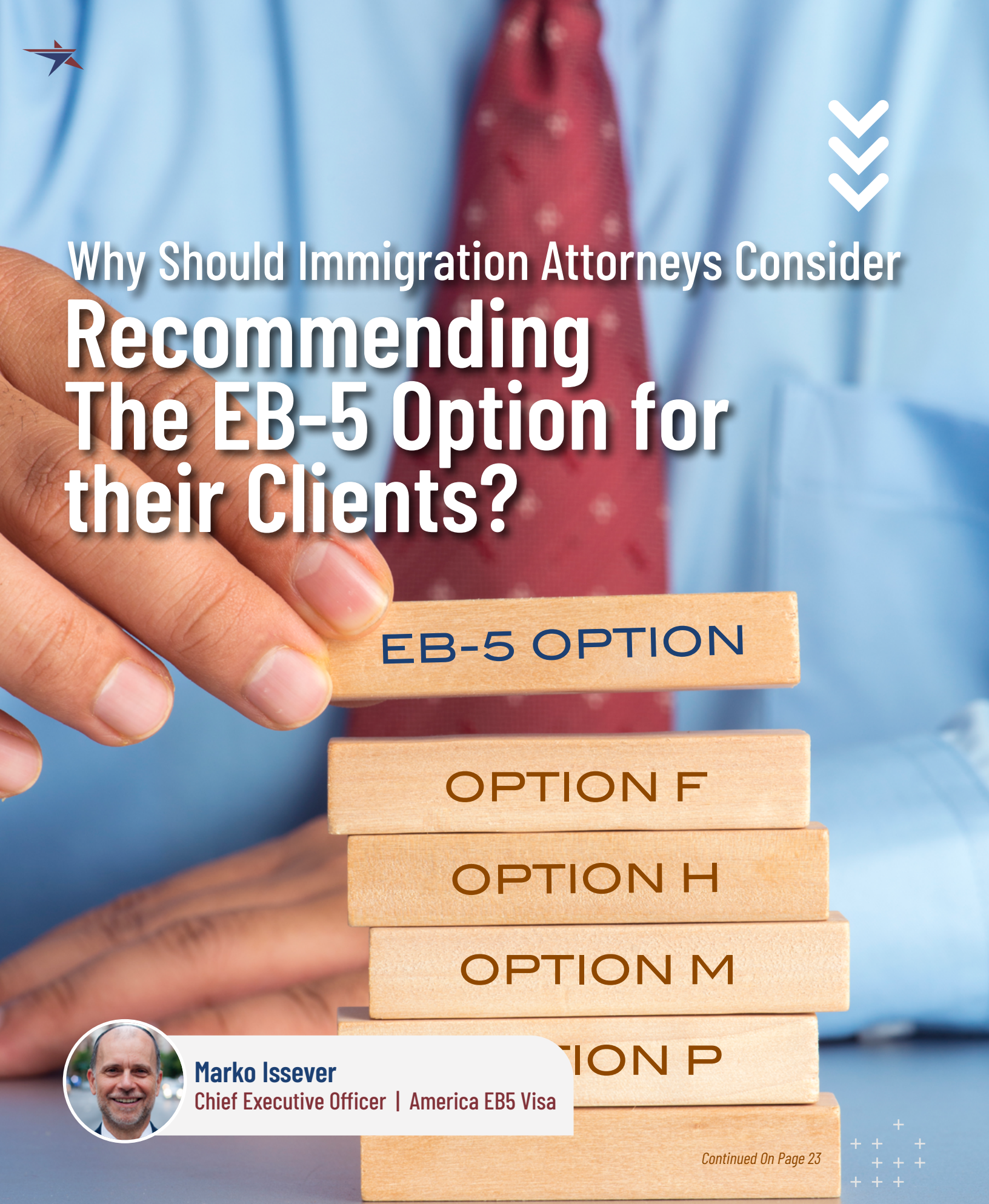
On the employment-based side, we have found that law firms representing some large companies are unfamiliar with the rules regarding conditional residents with denied I-829 petitions, and must be counseled that it is possible for the company to move forward with immigrant-visa petition sponsorship despite the employee's status as a conditional resident.

Q: What should an investor do if their I-829 petition is denied by USCIS?

A: It is essential to consult with an experienced immigration attorney who can explore and seek an individualized plan for the investor and each dependent family member. An attorney can guide the investor through the various legal options, help gather additional evidence, and provide representation in a motion to reopen/reconsider before USCIS or representation in removal proceedings in immigration court. The availability of federal court review must explored as well. With the right strategy, an investor may still be able to secure unconditional permanent residency—or at least retain the benefits of conditional green card status and prolong a final order of removal for as long as possible to pursue other immigration avenues or accomplish family goals.

[10] Id. at 594–95 (stating that the noncitizen has all rights provided by 8 U.S.C. § 1229a(b)(1) and (b)(4), such that they "may introduce, and the Immigration Judge should consider, material and relevant evidence without regard to whether it was previously submitted or considered in proceedings before the DHS"); see 8 U.S.C. §§ 1229a(b)(1), (b)(4) (the noncitizen "shall have a reasonable opportunity to examine the evidence against the [noncitizen], to present evidence on the [noncitizen]'s own behalf, and to cross-examine witnesses.").
[11] See 8 U.S.C. 1229b.
[12] 6 USCIS Policy Manual, Pt. G, Chap. 7, § D.
[13] E.g., Chang v. United States, 327 F.3d 911 (9th Cir. 2003).

Why Should Immigration Attorneys Consider Recommending The EB-5 Option for their Clients?



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Others have addressed this critical issue before and concluded that immigration attorneys should include the EB-5 option in their menu because it makes sense for many clients. It is not necessarily the solution for every client looking to obtain a green card, but there are quite a few groups for whom EB-5 is the best option, perhaps the only viable option. Therefore, they would not be getting comprehensive immigration advice if their immigration attorneys did not present the EB-5 option to these clients.

Why are some or perhaps most immigration attorneys reluctant to offer EB-5 as an option to their clients seeking permanent resident status in the U.S.?

The answer, for the most part, is historical. Although not meant to be an exhaustive list, the following will give the reader an idea of some potential myths as to why immigration attorneys refrain from pursuing EB-5 for their clients. Each of these reasons must be addressed to minimize potential "phobias" regarding EB-5 held by professionals representing their clients and genuinely wanting to execute the best course of action for them.

1. Complicated process
2. Global tax/residency requirement
3. Long processing times
4. Involves potentially risky investments resulting in capital payback risk
5. Expensive, time value of money, opportunity cost of the EB-5 investment
6. Conflict of interest between lenders of capital and users of capital (i.e., the developers)
7. Redeployment risk
8. Job creation responsibility
9. Not enough supervision of the EB-5 stakeholders, which can lead to fraud risk
10. Investment is a black box and requires a tedious due diligence process

While this list is not necessarily exhaustive, this article will address each of these issues and explain why immigration attorneys should consider recommending EB-5 to their clients as a viable option to obtain permanent residency in the United States.

1. Complicated process

While it is true EB-5 is complicated, there are many stakeholders with varying expertise that can service the investors as solution partners. Investors mitigate the risk of choosing a weak project by carefully selecting a qualifying project by working with a professional such as a licensed broker-dealer.

Source of funds

Although the source of funds is under increased scrutiny when compared with other investment-based visa types (such as E-1/E-2), if the investor can document how they earned the funds they will use for the capital investment, their task is surmountable.

Path of funds

The path of funds (in other words, the funds transfer from the foreign country of origin to the U.S.), is not an issue in most cases. However, in countries like Mainland China, India, Vietnam, and Bangladesh, there are restrictions on the amount of funds an individual is allowed to transfer out of the country. Nevertheless, an investor can overcome this issue by utilizing the services of professionals specializing in money transfers.

Too many requests for evidence (RFEs), Notice of Intent to Deny (NOIDs), Denials

It is also true that we saw an increased number of RFEs and NOIDs before the passage of the Reform and Integrity Act of 2022 (the RIA). Fortunately, the number of denials has significantly decreased since then. Investors are vetting projects better. The immigration attorneys filing EB-5 petitions are also more careful with the source of funds. Even though we still see several RFEs for technical spurious reasons, there are relatively fewer post-RIA because Regional Centers (RCs) must now file the project details with the USCIS through Form I-956F.

Long and tedious application forms

Since the RC's I-956F filing makes the application process more straight forward, immigration attorneys no longer must prepare long and complicated filings with USCIS. The investor EB-5 petition (i.e., the I-526E Petition), is a standard form, much like other forms immigration attorneys are familiar with. The only two sections that are EB-5-specific are the rigorous source of funds analysis and the reference to the I-956F filing. Immigration attorneys do not include detailed project information anymore when preparing investor petitions. They need only reference the I-956F filed by the RC.

Retrogression

Investors born in countries like Mainland China and India continue to experience a backlog concerning visa availability (known as retrogression). However, the RIA dealt with this issue by creating visa set-asides. New applicants can avail themselves of a combined 3,200 visa set-asides if they invest in Rural (2000), urban TEA (1000), or infrastructure (200) projects. In addition, there have been many unused visas in previous years that have rolled over to EB-5. There is no significant retrogression concern for the time being for post-RIA investors who invest in these types of projects instead of straight urban ones (all of which remain current as of the latest State Department Visa Bulletin).

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2. Global tax / double taxation / residency requirement

While this is a legitimate concern, it is not EB-5-specific. Anybody considering obtaining permanent residency status in the U.S. or US citizenship must deal with this requirement. That said, there are certain misconceptions about this requirement as well. If there is a tax treaty between the candidate's original country of citizenship and the U.S., the foreign tax credits would offset a substantial, if not all, of the additional tax liability of non-U.S. income.

3. Long processing times

The processing times have become significantly shorter, and the adjudication process has become more efficient post-RIA. USCIS is currently processing most I-526E applications in less than a year for rural and urban TEA projects, while pre-RIA, an I-526 approval took over four years. The EB-5 investor petition has been reduced to the I-526E Petition. All the project-related information is part of the I-956F application filed by the RC. This is a welcome development that has simplified not only the immigration attorney's work but the adjudicator's work as well. In the new environment, adjudicators who review the cases are already familiar with the project in which the investor has invested. As a result, they can process the cases faster and more efficiently.

4. Involves potentially risky investments resulting in capital payback risk

Immigration attorneys do not have to refer their clients to RCs, implicitly appearing to be endorsing the project sponsors. No experienced immigration attorney is interested in doing this. Unfortunately, since the investment in a qualified project is part of the EB-5 application process, many ignore EB-5 as a legitimate option for their clients. It does not have to be like this. The RIA mandate of the I-956K filing requirement makes the project introduction and due diligence task assigned to regulated third-party promoters, such as licensed U.S. broker-dealers. In other words, immigration attorneys should not refrain from EB-5 because they do not want to direct their clients to various investment options. Instead, they should direct them to broker-dealers, who represent already-vetted projects with ready-to-study due diligence materials. This access to information can help reduce the capital repayment risk.

5. Expensive, time value of money, opportunity cost of the EB-5 investment

There is no denying that EB-5 is a more costly immigration option than family-based and many other employment-based programs. Of course, immigration attorneys should present their clients with these less expensive options if they are viable. But for those candidates for whom family-based immigration is not an option, or the other employment-based options such as EB-2 and EB-3 that have significant retrogression concerns, EB-5 could be the only viable option. For example, provided they already have access to the required investment capital, for India-born H-1B visa holders, the opportunity cost of the EB-5 investment is the time value of money. Although a significant sum, the cost of potential loss of income is much higher than this opportunity cost with the additional benefit of self-sponsorship without being bound to any employer. They can negotiate a much better compensation package through the green card and employment authorization they get via EB-5. They can work anywhere they want. They can also start their own business, a choice most make towards total financial freedom.

6. Conflict of interest between lenders of capital and users of capital, the developers

There are two different RC models. When the investor invests his capital into an EB-5 project, the funds go into a special-purpose company called the New Commercial Enterprise (the NCE). The RC typically manages this special-purpose company and invests the EB-5 capital as a loan or equity investment into another special-purpose company called the Job Creating Entity (the JCE). There is a potential conflict of interest when the NCE and the JCE are substantially owned and/or controlled by the same principals (often the developer of the project). However, an arms-length relationship exists between the NCE and the JCE in most of the other typical RC-based structures. In these typical structures, while the NCE is controlled and managed by the RC, the JCE is controlled by the developer.

The loan documents between the NCE, as lender, and the JCE as borrower, typically include strong covenants designed to protect the NCE. These provisions help mitigate the potential conflict of interest between the lenders and borrowers of capital. It is important to note that notwithstanding this potential conflict of interest, there is a benefit of the affiliated developer and RC model. Investors have only one responsible party they have to deal with.

7. Redeployment risk

Redeployment risk is the risk that the project sponsors would reinvest investor's capital in other projects due to either the terms set forth in the private placement memorandum (PPM) plus optional extension rights of the sponsor not being met or investor-specific issues such as not having fulfilled the sustainment period, however that is defined. Currently, as far as capital repayment is concerned, as opposed to when an investor is eligible to file for permanent residency status, the definition of sustainment period is contested in the federal courts.

USCIS believes that the RIA allows investors to receive their capital back after two years of capital usage by the project developer-controlled JCE, assuming the creation of a minimum of ten jobs attributable to the specific investor. There are many projects in the EB-5 market where the redeployment risk is minimal, regardless of the outcome of the interpretation of the sustainment period. Moreover, most PPMs restrict the sponsors from redeploying the funds in a riskier project than the original one investor selects for their EB-5 petition. Many redeployed funds become senior obligations of the subsequent borrowers, providing additional capital repayment security.

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8. Job creation responsibility

Investors have direct job creation responsibility when applying for the EB-5 through a direct EB-5 application. However, the job creation responsibility is passive when applying through the RC program. Most of the required jobs in the RC model are indirectly created through the output of statistical models. The most significant variables are capital expenditure and building completion. Developers of most projects end up spending, at the minimum, the stated capital stack in the business plan. The building completion guarantee kicks in if they run out of funds before project completion. If the building completion guarantee provider is a reputable third party, the risk of leaving the project incomplete becomes minimal. As for capital expenditure, unless we experience deflation, neither commodity prices nor labor costs ever come down. As a result, developers spend the same, if not more, funds than projected in the business plan. As such, investors do not have to worry about the job creation responsibility, provided they select a project with a comfortable job "cushion" (i.e., enough jobs to allocate more than 10 per investor).

9. Not enough supervision of the EB-5 stakeholders, fraud risk

Lack of supervision and resulting noncompliance was a significant issue, pre-RIA. However, RIA changed the EB-5 landscape for all its stakeholders, most notably by introducing various integrity measures described below:

- **Regional Center Program Audits:** All RCs will undergo a USCIS audit at least once every five years.
- **EB-5 Integrity Fund (Integrity Fund):** Created to detect and investigate fraud or other crimes; to determine whether RCs, NCEs, JCEs, and alien investors (and their alien spouses and children) comply with the immigration laws; to conduct audits and site visits, among others. Each RC must contribute $10,000-$20,000 annually (depending on the size of the RC) for the Integrity Fund starting October 1, 2022. These new measures should prevent fraud and abuse and assist the Department of Homeland Security (DHS) in preventing national security breaches. They will allow USCIS to investigate and monitor all parties within the EB-5 industry to ensure compliance.
- **Direct and third-party promoters (including migration agents):** These promoters must be registered with USCIS. Each investor's EB-5 petition must include a disclosure signed by the investor, that reflects all fees, ongoing interest, and other compensation paid to any person, agents, finder or broker-dealer that the RC or NCE knows has received, or will receive, compensation in connection with the offering.
- **Fund Administrator:** Unless the NCE will be audited, NCEs are required to engage fund administrators to monitor and track any transfer of amounts from the separate account. Fund administrators also serve as a co-signatory on all separate accounts and verify that the transfer complies with all governing documents, including organizational, operational, and investment documents.

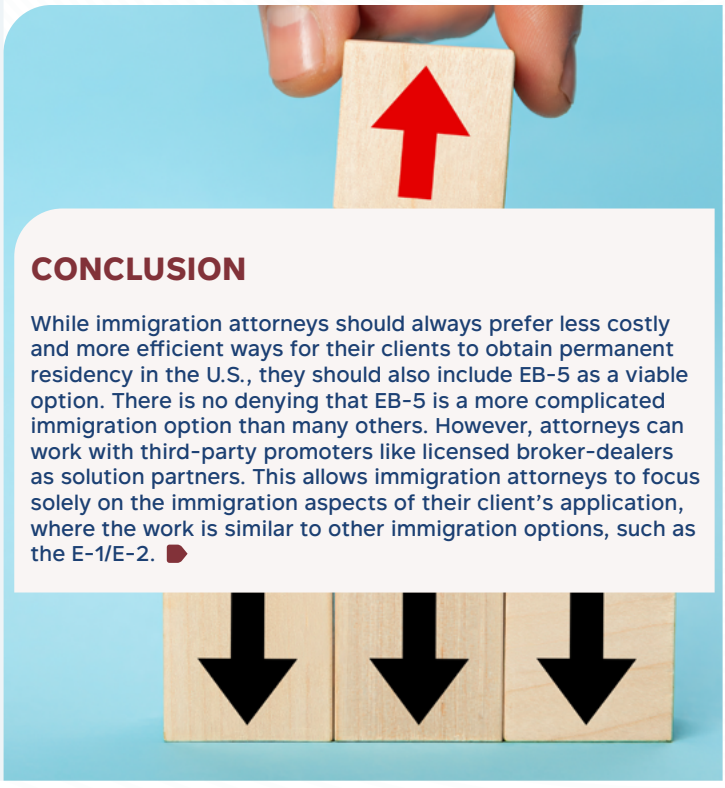
Thanks to these measures, EB-5 investments are now as secure as any other private placement security that sophisticated and accredited investors typically engage with. In addition to the oversight provided by FINRA and the SEC for similar investments, EB-5 projects also benefit from USCIS supervision, as required by the RIA.

10. Investment is a "black box," and the due diligence process is tedious

We often hear this criticism about EB-5. Here are some of those common complaints:

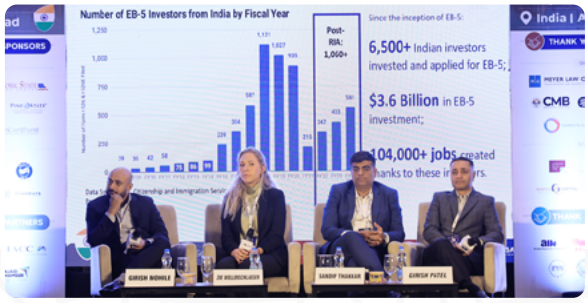
- **"I am not qualified to go through the project deck."**
- **"The relevant information regarding the transaction is all over the place."**
- **"The private placement memorandum (PPM), the appraisal report, the loan agreement, and the escrow agreement are unclear."**

Many immigration attorneys, either having never filed an EB-5 petition or having had a negative experience with it, opt to exclude EB-5 from the immigration options they offer to their clients. Third-party promoters, such as licensed broker-dealers, exist precisely to help address this issue. They present fully vetted projects to the investors from multiple sources with varying features. While it is the job of the immigration attorney to guide the investor through the immigration process and the source of funds, it is the job of third-party promotors to guide investors in project selection and due diligence, which can help demystify that process.



CONCLUSION

While immigration attorneys should always prefer less costly and more efficient ways for their clients to obtain permanent residency in the U.S., they should also include EB-5 as a viable option. There is no denying that EB-5 is a more complicated immigration option than many others. However, attorneys can work with third-party promoters like licensed broker-dealers as solution partners. This allows immigration attorneys to focus solely on the immigration aspects of their client's application, where the work is similar to other immigration options, such as the E-1/E-2.



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NOITs Regarding EB-5 Integrity Fund: What Should You Do?

Simone Williams-Arrington
Founder & Managing Partner | Williams Global Law

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This article originally was published to the IIUSA blog on July 31, 2024. This article includes an update that reflects recent developments from USCIS.

UPDATE:

Good news - **The United States Citizenship and Immigration Services (USCIS)** has recently made accommodations for regional centers since IIUSA published our blog post.

According to USCIS, regional centers that failed to pay fees for FY 2023 and/or FY 2024 will be allowed to make delinquent payments for FY 2023 and FY 2024 from October 1, 2024, through December 30, 2024. This December 30, 2024 due date encompasses the promised 90-day grace period.

Please note that regional centers are required to pay FY 2025 fees **in addition to the FY 2023 and FY 2024**. Integrity fees for FY 2025 were due on October 1, 2024. USCIS will reject any EB-5 Integrity Fund fee payments for FY 2023, FY 2024, and FY 2025 that are received after December 30, 2024.

USCIS emphasizes that it will take all necessary steps to terminate any regional center that, on or before December 30, 2024, has not paid the required EB-5 Integrity Fund fees for each of FY 2023, FY 2024, and FY 2025.

To pay the annual fees online, visit **Pay.gov**. USCIS will not accept any other payment method.
For more information on the EB-5 integrity fees and critical instructions on how to pay, please visit the USCIS Integrity Fund page, **here**.

This is more than a fair accommodation given the confusion with due dates for the Integrity fee, so we urge all Regional Centers to pay promptly this time!

ORIGINAL ARTICLE:

Has your Regional Center received a Notice of Intent to Terminate (NOIT) with little to no option for recourse and a tight deadline? Trust me, you are not alone.

It appears that the United States Citizenship and Immigration Services (USCIS) issued a slew of NOITs to regional centers that failed to pay the annual EB-5 integrity fees. The situation is quite complicated. IIUSA has been discussing remedies both online and offline.

For better assessment of the overall situation, IIUSA is collecting data from regional centers. **If you or your client received a NOIT regarding the annual integrity fee, please fill out this simple Google Form**. The data collected from this form is critical for IIUSA to engage in meaningful advocacy for this immediate issue and to help set standards for the way USCIS navigates the EB-5 integrity fund in the future.

While IIUSA advocacy is a critical element in the overall solution, each regional center has an individual responsibility as well. On Thursday, July 18, IIUSA held a webinar titled, IIUSA Open Forum: USCIS NOITs Regarding Integrity Fees to help regional centers figure out options for their next steps.

The panel was moderated President of IIUSA and EB-5 New York State, Bill Gresser. Expert panelists included:

H. Ron Klasko, Managing Partner of Klasko Immigration Law Partners

Carolyn Lee, Founder of Carolyn Lee PLLC

Dan Lundy, Member of CSG Law Immigration Group

John P. Pratt, Partner of Kurzban Tetzeli & Pratt and Director of IIUSA.

These EB-5 experts were joined by a community of attorneys, Regional Center operators, and financial experts who have all been impacted by the recent rush of NOITs in the EB-5 universe.

To break this down simply, we will answer three (3) questions:

1. What should you do?
2. Why is this happening?
3. What are the possible outcomes?

Continued On Page 30

WHAT SHOULD YOU DO?

RESPOND, RESPOND, RESPOND! Not only should you timely respond to the NOIT, but you should also provide a factual and strong legal argument. During the panel, experts agreed that a simple plea for forgiveness with a check attached may not suffice. In fact, many panelists opined that sending a check with the payments may cause USCIS to return the mailed response, leading to an untimely submission determination. Instead, panelists leaned heavily on the need to submit factual and legal arguments.

First, IIUSA panelists encourages each regional center to provide factual arguments. Did your regional center miss both payments? Did it pay only one? Was your regional center waiting to receive approval for designation? Answer those questions factually.

Then, present your legal argument. Overwhelmingly, many will agree that USCIS language led to confusion. From changing due dates to vagueness about which fiscal year needed to be accounted for, one can derive a legal argument about the lack of clarity on an issue that would lead to mandatory termination. Additionally, experts in the session discussed that USCIS did not provide an option for remedy. Normally, USCIS would issue a Notice of Intent to Suspend or send correspondence up to 90 days after the due date to allow regional centers a timely remedy. Many attorneys will suggest an option for regional centers to pay integrity fees for both fiscal years and a late penalty fee offered to regional centers. Lastly, experts pointed out that USCIS has already used their discretion to extend the deadline in May 2023. Therefore, it is within the scope of their power to extend the deadline again to accommodate the hundreds of regional centers facing this issue.

Ultimately, each regional center and their counsel must look at their specific situation to determine the best legal arguments.

Another important question arises: ***Should regional centers tell investors about the risk of termination?***

Panelists were undecided on this point. If regional centers are actively raising funds, it is best to put fundraising procedures on pause as this uncertain process continues.

Whether or not regional centers should notify investors about the potential failures has not been conclusively decided. Regional centers should defer to their securities counsel for legal requirements to inform investors about this development. Certainly, investors want the opportunity to decide their next best step. If you are an investor reading this, ask your regional center if they have received a Notice of Intent to Terminate (NOIT) and how they plan to respond. Many regional centers have until the end of July to respond. Additionally, investors and regional centers should contact their EB-5 immigration attorneys to discuss the possibility of invoking the Good Faith Investor Provisions. The Good Faith Investor Provisions were set in place to protect investors in the case of terminations based on purely administrative noncompliance.

WHY IS THIS HAPPENING?

Many did not understand that **two** integrity fees were supposed to be paid in 2023. As many of you know, President Joe Biden signed the EB-5 Reform and Integrity Act of 2022 ("RIA") over two years ago. The RIA established a special fund known as the EB-5 Integrity Fund.[1] This fund would be financed by collecting an annual fee from each designated regional center.[2] On March 2, 2023, USCIS posted a Federal Register notice explaining that the first fee

[1] https://www.uscis.gov/IntegrityFund
[2] https://www.uscis.gov/IntegrityFund

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must be paid by April 1, 2023. In an admission that, "information about the due dates and penalties might not have been clear," USCIS extended the due date to October 1, 2023. USCIS also asserted that further integrity fee payments must be made before October 31 of every year.

The series of announcements and moving due dates led to a lot of confusion from regional centers. Regional centers had to pay the FY 2023 integrity fee **and** the FY 2024 fee by October 31, 2023. Ultimately, USCIS's effort to accumulate the integrity fees for the current and upcoming fiscal year resulted in a critical distinction slipping through the cracks.

Now we see just how critical this distinction was. USCIS declared that it would take steps to terminate any regional center that did not pay the required EB-5 Integrity Fund fees for FY 2023 and FY 2024 within at 90 days of the October 31 due date. According to USCIS, regional centers who received NOITs will be terminated unless they can show that they paid both integrity fees.

WHAT ARE THE POSSIBLE OUTCOMES?

Every regional center must accept the possibility of termination. This is an unprecedented situation, even for USCIS; however, it is possible that USCIS will double down on their decision to terminate despite the responses from regional centers.

It is also possible that the sheer number of responses from regional centers that want to continue despite not paying the integrity fees will cause USCIS to provide an out. However, we must acknowledge that USCIS knows exactly how many NOITs it sent out. The hope is that USCIS underestimated how many regional centers were confused by the language in the Federal Register and subsequent announcements. If USCIS does provide an out for regional centers, it may come in the form of a short extension period and a penalty fee.

If USCIS issues sweeping terminations, each regional center has a right to appeal to the Administrative Appeals Office ("AAO") within thirty (30) days. In this case, a regional center is not technically terminated until it loses at the AAO. This may allow the regional center to stay in business for up to one year, depending on the duration of the AAO appeal. This option may protect investors as they figure out their options. The RIA requires appeals to go through the AAO before it is brought to Federal Court. If a regional center tries to skip the AAO and go straight to Federal Court, they risk a loss by failing to exhaust all administration options for remedy. Even in cases where litigation has grounds that the AAO cannot deal with, most panelists agreed that going through AAO first is the safest route.

While each regional center is responding individually, IIUSA is actively advocating to the Office of the Citizenship and Immigration Services Ombudsman (CIS Ombudsman) which serves as a liaison between the public and USCIS.[3] IIUSA is also considering litigation, but this will likely be initiated if widespread terminations are issued.

In either of these cases, IIUSA will need to continue collecting data from regional centers. Please fill out this **form**[4] to help IIUSA advocate on behalf of regional centers and investors nationwide.

And remember: **RESPOND! RESPOND! RESPOND!**

For more information, view the USCIS EB-5 Integrity Fund **page**.

[3] https://www.dhs.gov/topics/cis-ombudsman
[4] https://docs.google.com/forms/d/e/1FAIpQLSfpB8BV30sxXrZz1J32-DCY0C9-I92Id_X_54Lm6wsFTkUvXQ/viewform

The Demise of Chevron Deference

What Loper Bright Means for EB-5 Stakeholders

Kristal Ozmun
Partner | Miller Mayer

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Recently, in *Loper Bright Enterprises v. Raimondo*,[1] the U.S. Supreme Court overruled its decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*.[2] Chevron deference, the well-known holding of the case, required courts to defer to agency interpretation of ambiguous statutes and became a household name due to its application in an astounding 18,000+ federal court decisions.[3] While the decisions in those cases remain good law pursuant to stare decisis, the Loper Bright decision will undoubtedly have major ramifications for many future administrative law cases including those in the immigration sphere. Whether Loper Bright will have a substantial impact in the EB-5 context, more specifically, is unclear. Nevertheless, it may open a window for change as discussed below.

As background, the *Chevron* standard of deference imposed a two-step analysis. First, if Congress has clearly spoken to the issue presented, a court must enforce their unambiguous intent. However, if the statute is silent or ambiguous on the issue, a court must defer to an agency's interpretation as long as it is a "permissible construction of the statute."[4]

In striking down *Chevron*, the Court found that its holding was fundamentally at odds with the Administrative Procedure Act (the "APA"), which requires courts to decide "all relevant questions of law." Indeed, *Loper Bright* declared that it "makes no sense to speak of a "permissible" interpretation that is not the one the court, after applying all relevant interpretive tools, concludes is best."[5] Nevertheless, Loper Bright indicates that courts should consider an agency's thoroughness, the validity of its reasoning, consistency with earlier and later pronouncements and any other persuasive facts in reaching a decision. This level of deference is referred to as *Skidmore*[6] deference.

The primary difference between the *Chevron* and *Skidmore* standards of deference is the weight given to an agency's interpretation. Under *Chevron*, an agency's interpretation needs only be permissible while under *Skidmore*, it must be persuasive. Thus, the question here is whether that change in weight will lend itself to different outcomes in EB-5 litigation.

Looking at a handful of recent cases brought by regional centers against USCIS, the answer seems likely to be "no," at least in the fact pattern of regional center v. USCIS. This is because in each of the cases, the court never got to step 2 in the *Chevron* analysis. That is, the court in each case found the statute to be unambiguous on the question presented and thus did not need to defer to (or even refer to) agency interpretation. However, in cases where ambiguity exists, the switch to *Skidmore* deference suggests a different outcome may be possible. As illustrated in *Nguyen*[7] and discussed below, ambiguity may be more prevalent in statutory provisions relative to immigrant investors. Under Skidmore, USCIS will have to persuade courts of its interpretation of those provisions, which could provide more room for successful challenges to agency decisions especially those brought by immigrant investors.

In *Gulf States Reg'l Ctr., LLC v. Jaddou*,[8] Gulf States Regional Center filed suit against USCIS claiming that USCIS violated the APA by requiring regional centers approved under the original Regional Center Program[9] ("PARCs") to submit Form I-956, Application for Regional Center Designation, to sponsor new projects and investors under the EB-5 Reform and Integrity Act of 2022 (the "RIA"). Applying step 1 of Chevron, the court determined that the text of the RIA was clear: "Congress intended to require PARCs seeking to operate as regional centers for the purpose of new projects and investors to seek designation as a regional center under subparagraph (E) of the RIA."[10]

In *EB5 Holdings, Inc. v. Jaddou*,[11] EB-5 Holdings, Inc., Gulf States Regional Center, LLC, and Sun Corridor Regional Center, Inc. filed suit against USCIS alleging that USCIS violated the APA by requiring them to pay the annual EB-5 Integrity Fund fee instituted under the RIA. In applying step 1 of Chevron, the court found that the RIA "expressed an unambiguous intent that the annual Integrity Fund Fee apply to both pre-existing and post-RIA regional centers alike."[12] A second federal district court reached the same conclusion in *Sunshine State Reg'l Ctr., Inc. v. Jaddou*,[13] finding that the RIA clearly required pre- and post-RIA regional centers to pay the annual EB-5 Integrity Fund fee.

In contrast, the court in *Nguyen v. USCIS*,[14] found the statute to be ambiguous in analyzing whether "capital" invested by an immigrant investor must be lawfully sourced. Thus, the court moved to step 2 of Chevron finding that "USCIS' interpretation of the term "capital" to include only funds and assets that were lawfully sourced, is a reasonable construction of the statute and well within USCIS' authority."[15] While the result in *Nguyen* is the same as those discussed above – USCIS' interpretation prevailed – the path there differs. That is, the court got to step 2 in Chevron and gave great weight to USCIS' construction of the term "capital" noting that it could only reject USCIS' interpretation if it was "arbitrary, capricious, or manifestly contrary to the statute."

As such, it is plausible that a court could reach a different outcome if USCIS were required to make a persuasive showing as opposed to merely a permissible one. Put another way, if a case arises on a point wherein the RIA is ambiguous (as it is in many places), a plaintiff might be able to successfully argue that USCIS' interpretation is unreasonable. Indeed, deference to USCIS interpretation has been key in shaping EB-5 program policies particularly with respect to investor- specific requirements like source of funds. Thus, while the immediate effects of Loper Bright may not be fully apparent, the decision opens the door for more rigorous judicial review of USCIS decisions in ambiguous areas, which shift could influence future EB-5 litigation and potentially offer more favorable outcomes for stakeholders, and in particular immigrant investors, challenging USCIS decisions.

[1] 144 S. Ct. 2244 (2024) (overruling Chevron deference).
[2] 467 U.S. 837 (1984) (implementing Chevron deference framework).
[3] Loper Bright Enterprises at 2307 (citing K. Barnett & C. Walker, Chevron and Stare Decisis, 31 Geo. Mason L. Rev. 475, 477, and n. 11 (2024)).
[4] See Chevron at 842.
[5] Loper Bright Enterprises at 2251.
[6] 323 U.S. 134 (1944). In Skidmore v. Swift & Co., the Court stated, "We consider that the rulings, interpretations, and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." The Court further noted, "The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."
[7] 637 F. Supp. 3d. 822 (2022).
[8] 2023 U.S. Dist. LEXIS 136555.
[9] Section 610 of Public Law 102-395, 8 U.S.C. 1153.
[10] Id. at 13.
[11] 2024 U.S. Dist. LEXIS 28292.
[12] Id. at 31.
[13] 2023 U.S. Dist. LEXIS 93388.
[14] 637 F. Supp. 3d. 822 (2022).
[15] Id. at 829.

EB-5 Sanctions:

Real Danger with Possible Relief

Robert Divine
Shareholder | Baker Donelson

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The EB-5 Reform and Integrity Act of 2022 ("RIA")[3] gave USCIS new authority to impose sanctions on parties who misuse the EB-5 program, and USCIS has published a new chapter of its Policy Manual[4] to guide USCIS adjudicators and managers in wielding that authority. Happily, for investors, if USCIS imposes the ultimate sanction of termination or debarment they have an avenue for relief, and USCIS has clarified a few things about that in an updated "EB-5 Questions and Answers" publication[5] and in a new section of the Policy Manual.[6]

This article uses abbreviations for RIA (see above), regional center (RC), new commercial enterprise (NCE), and job-creating entity (JCE). It refers to subsections under INA § 203(b)(5) [the primary encoded provisions of the RIA] as {Subsection ([letter])," so INA § 203(b)(5)(G) is referred to as "Subsection (G)."

WHO CAN BE SANCTIONED AND FOR WHAT?

For the most part, the RIA describes specific sanctions for specific violations.

Annual Statements.
The sanctions in Subsection (G) arise from violations concerning regional center annual statements (including not filing them), but those statements incorporate NCE attachments about a broad range of NCE and JCE activity, and violations giving rise to sanctions include the RC "conducting itself in a manner inconsistent with its designation" and NCEs making "willful, undisclosed, material deviation" from their business plans. "Authorized sanctions" include not only fines against the regional center but also suspension and debarment of "1 or more individuals or business entities associated with the [RC], [NCE], or [JCE]."

Prohibited Persons.
Subsection (H) generally prohibits the involvement in the EB-5 Program of anyone with a relevant history of criminal, fraud, or securities violations or national security concern. It carries out this prohibition by requiring a Form I-956H or similar "bad actor questionnaire"[7] from anyone to be involved with a RC, NCE, JCE,[8] promoter,[9] or investor[10] and by requiring such individuals to undergo biometric screening.[11] Sanctions include suspension or termination/debarment of an RC, NCE, or JCE if it knowingly involved with itself a prohibited person for 14 days or did not notify USCIS about it, failed to file an I-956H requested by USCIS, or knowingly provided false information in a Form I-956H. Does this include involving someone who was not in fact a prohibited person without filing an I-956H? This matters because USCIS has taken an aggressively expansive approach to who is "involved with" an entity.

Securities Compliance.
Subsection (I) authorizes suspension, termination, or "other sanctions" against a RC for being or associating with any party who is subject to certain securities sanctions by a court, the SEC, or a state securities regulator or who submitted a certification of securities compliance (in the I-956F or I-956G) containing an untrue statement or omission of material fact. An NCE's misleading statement or omission in a securities offering to EB-5 investors would subject it to the enforcement authority of the U.S. Securities and Exchange Commission.

Integrity Fees.
Subsection (J) requires USCIS to terminate the designation of a regional center that fails to timely pay its integrity fees in the proper amount between October 1 and December 30[12] of each year. While I-956G annual statements and filing fees are submitted for the preceding fiscal year, the integrity fee is required for the new fiscal year. For complicated reasons, USCIS is allowing payments for any of the first three years (FY2023, 24, and 25) to be paid by December 30, 2024, but failure to pay by that date using pay.gov will result in RC termination.

Promoters.
USCIS may suspend or debar a promoter [footnote "direct and third party," whatever that means] who fails to file proper USCIS registration using Form I-956K with a written NCE agreement before promoting a project, is a prohibited person, or violates yet un-issued guidelines for accurately representing the visa process to investors or for fee arrangements. A regional center who fails to ensure that required I-956K forms are filed and promoter compensation properly disclosed might be sanctioned by USCIS under Subsection (G) for "conducting itself in a manner inconsistent with its designation." It is not clear by what authority an NCE could be sanctioned for failing to have written agreements with promoters.

National Security and Fraud.
Subsections (N) and (O) require USCIS to "deny or revoke the approval of a petition, application, or benefit" under the EB-5 Program that is "contrary to the national interest of the United States for reasons relating to threats to public safety or national security" or "was predicated on or involved fraud, deceit, intentional material misrepresentation, or criminal misuse." USCIS says this includes termination of a RC or debarment of an NCE or JCE involved in the misconduct. The statute also permanently debars from the EB-5 Program any associated person who USCIS determines in its discretion by a preponderance of the evidence was a knowing participant in the disqualifying conduct. USCIS says it may consider constructive knowledge or indirect participation in individual debarment decisions. Curiously, USCIS has volunteered that

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[1] For biography, see www.bakerdonelson.com/robert-c-divine.
[2] Baker Donelson is a law firm of over 650 attorneys and advisors in 25 offices, see www.bakerdonelson.com.
[3] Div. BB of the Consolidated Appropriations Act, 2022, Public Law 117-103.
[4] USCIS Policy Manual Vol. 6, Part G, Chapter 8, available at https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-8.
[5] https://www.uscis.gov/working-in-the-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-questions-and-answers.
[6] USCIS Policy Manual Vol. 6, Part G, Chapter 3, Section E, available at https://www.uscis.gov/policy-manual/volume-6-part-g-chapter-3.
[7] The "questionnaires" are contained in I-956H for persons involved in an RC, NCE, or JCE; I-956K for promoters; and I-526E for investors. "Bad actor questionnaire" is a securities industry term for a set of questions an issuer of securities normally should confirm with persons involved in a private securities offering under Regulations D, A, and CF under the Securities Act. For background, see Release No. 33-9414 (July 10, 2013), available at Final Rule: Disqualification of Felons and Other "Bad Actors" from Rule 506 Offerings (sec.gov). The SEC informed the legislators of the RIA about grounds of securities disqualification leading to Subsection (H). The RIA forms seem substantially equivalent to Regulation D bad actor questionnaires and may be appropriate to take their place in EB-5 offerings.
[8] Only persons involved with an "affiliated JCE" must submit Form I-956H with an I-956F project application in the first instance, but USCIS has discretion to require I-956H from persons involved with any other JCE.
[9] Form I-956K for promoter registration incorporates I-956H questions.
[10] USCIS has infused Form I-526E with the questions from I-956H.
[11] USCIS has not yet implemented biometrics for promoters, most of whom are outside the U.S., and investors undergo biometrics in their final immigrant visa or adjustment of status applications.
[12] Technically, the time to pay the integrity fee is between October 1 and October 31. After October 31, the RIA imposes a late fee up to December 30, but USCIS has not yet determined a late fee, so for now December 30 is the deadline. After December 30, USCIS closes the channel on pay.gov to pay the fee, and USCIS will initiate the termination process.

"[t]he exercise of discretion in all situations may not be arbitrary, inconsistent, or dependent on intangible or imagined circumstances."

In its Policy Manual USCIS seeks to define the grounds for debarment under Subsections (N) and (O) in terms of other immigration statutes. National interest grounds include, without limitation, the activities involved in inadmissibility and removal grounds for aggravated felonies, national security, and terrorism. As to fraud and misrepresentation, existing guidance on inadmissibility grounds may be relevant as to willfulness, intent, and materiality, but USCIS makes clear that the victim of misrepresentation need not be the government (and thus could be, for example, an investor). USCIS states that criminal misuse most likely arises in misuse of EB-5 capital in furtherance of financial crime.

USCIS emphasizes the high stakes for everyone involved in the EB-5 Program's integrity when it lists non-exhaustive examples of situations where permanent debarment of entities and individuals could arise:

- **The applicant, petitioner, or beneficiary engaged in financial fraud or financial crimes, including misappropriation of funds (Ponzi scheme, embezzlement, wire fraud, etc.);**
- **The applicant or petitioner falsified claims of job creation, economic development, or both;**
- **The applicant, petitioner, or beneficiary intentionally misrepresented the information provided or intentionally omitted required information;**
- **The attorney, preparer, promoter, or migration agent intentionally misrepresented the EB-5 program to an immigrant investor, either current or future;**
- **The attorney, preparer, promoter, or migration agent represented themselves as a registered broker but was not registered;**
- **The applicant or petitioner falsified one or more responses to the bona fide question set under INA 203(b)(5)(H);**
- **The applicant or petitioner falsified information about their background on a form (such as their credentials, education, employment), or presented altered or counterfeit documents;**
- **The applicant, petitioner, or beneficiary misrepresented, or concealed the source of funds or the path of funds;**
- **The petitioner presented derivatives that are not legal family members; or**
- **The petitioner or derivative assumed an alternate identity to attain an immigration benefit.**

CLARIFICATIONS

The Policy Manual clarifies some considerations shared by the different grounds for sanctions.

Appeals.
Subsection (P) allows for appeal to the USCIS Administrative Appeals Office concerning any USCIS sanction described above and requires exhaustion of such administrative appeal as a precondition for any lawsuit challenging the sanction. Subsection (P) also restricts to constitutional limits any judicial review of a sanction from threat to national security.

Sanctions Process and Duration.
USCIS describes a process for sanctions much like USCIS Notices of Intent to Deny with a 30 day response time but with USCIS discretion to consider late response. USCIS claims authority to sanction "associated parties" as well as primary entities and to add further sanctions later, especially if a party does not cure a violation. USCIS lists a broad range of predictable factors it may consider in determining sanctions, including violation history, severity of violation, rectification efforts, and the impact on third parties. Several listed factors suggest that an entity might avoid or reduce sanctions if it had or subsequently installs a meaningful compliance policy including training, internal investigation, and government cooperation.

Importantly, USCIS says, "Suspensions, debarments, and terminations are final upon the expiration of the period in which to file an appeal or, if appealed, upon the decision on that appeal." This is contrary to the position that USCIS took in the past when prior to the RIA it took action against investors based on RC terminations even while administrative appeal of the termination was still pending.

USCIS says suspensions may be for a specific period or until the entity cures the violation and USCIS recognizes the cure. Generally, during a regional center suspension, investors may continue to file and receive adjudication on an approved project application, but no new I-956F may be filed, and USCIS may hold adjudication of any pending I-956F and any investor petitions that relate to it. On the other hand, USCIS says usually it will refrain from adjudicating investor petitions relating to a suspended NCE or JCE even if the I-956F is already approved. Nevertheless, USCIS gives adjudicators case-by-case discretion to determine the scope of a suspension's effect. Investors should inquire poignantly about any pending sanctions, and NCEs (under RC oversight) must disclose pending sanctions proceedings in their offerings to avoid misleading prospective investors.

TERMINATION AND DEBARMENT: THE ULTIMATE SANCTIONS TRIGGERING REMEDIES FOR INVESTORS

Under Subsection (M), regional center termination or NCE or JCE debarment has the effect of "terminating" an investor's I-526 petition or conditional permanent residence status unless the investor is able to file an amended petition qualifying for the "good faith investors" protection. Subsection (M) is

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complicated and leaves some questions unanswered. USCIS has answered some questions in its EB-5 Questions and Answers update in July 2024, including most importantly that Subsection (M) applies to both pre-RIA and post-RIA investors.

To qualify for I-526 or I-829 petition approval under Subsection (M), the following must be shown:

- The petition is "otherwise qualified." This seems to mean that the original business plan qualified and the investor's source of funds are shown to be legitimate.
- USCIS terminates the RC or debars the NCE or JCE and notifies the investor about it (perhaps in a notice of intent to deny or revoke a petition). Nothing but termination or debarment of the entity triggers the remedies. Thus, for instance, USCIS suspension of the NCE will not. It appears that USCIS cannot treat the entity as terminated or debarred until any timely AAO appeal by the entity is resolved, which could result in some protracted limbo for affected investors. USCIS has asserted that it alone has authority to issue terminations and debarments; while a RC can withdraw from the EB-5 Program and request termination, no one can request debarment; and USCIS will not debar an entity solely because a project failed. It remains to be seen whether a court may be persuaded to require USCIS to debar an entity when USCIS fails to act on an egregious case or whether a court may itself order debarment of a party and order USCIS to issue protection-triggering notice to investors under (M).
- Within 180 days after such notification, the investor submits to USCIS an "amendment" to the petition to show that the investor "continues to meet the eligibility requirements" concerning a new RC or investment; either:
  - If the RC was terminated, EITHER the original NCE associates with an approved RC anywhere in the U.S. OR the investor makes a "qualifying investment" in another NCE

  OR
  - If the NCE or JCE was debarred, the investor associates with an NCE in good standing AND invests additional capital "solely to the extent necessary to satisfy remaining job creation requirements."
- In meeting the investment and job creation requirements, material changes are not a problem, the investor can be credited with funds recovered from third parties (such as a receiver clawing back diverted funds from wrongdoers, or insurance proceeds), and the investor can "top off" with additional funds (ostensibly having to show legitimate sources for such funds).
- USCIS has clarified that at least for NCE terminations, the amount of investment that must be sustained (ostensibly either in the original NCE or in combination with a new NCE) is the amount required when the investor filed the I-526 petition, which for RIA investors in a TEA would be $500,000, but only if the further investment is also in a TEA.[13] USCIS recognizes that the standards after RC termination are different from those after debarment but does not explain how. Investors can argue that after debarment they don't even need to sustain the $500,000 or $800,000 investment
- Amended petitions retain the original priority date, and their children may be saved from "age out" from derivative eligibility.

USCIS has stated in mysteriously cagey terms that a pre-RIA investor whose RC becomes terminated for administrative reasons (such as non-payment of the integrity fee) or even for conduct associated with another project probably will be adjudicated without having to file an amended petition under Subsection (M).

CONCLUSION

Although technicalities and uncertainties persist, USCIS has lots of authority to sanction the players in the EB-5 Program who fail to follow the demanding new "integrity measures." Regional centers may be held to "strict liability" for transgressions of sponsored NCEs and their promoters and JCEs, especially where money gets actually mishandled. Extreme real-time oversight and rigorous recordkeeping are advised. Investors should inquire about pending sanctions. In extreme cases, termination or debarment might be beneficial to investors, but the workout process will be long and complex.

[13] This creates a nasty issue whether the requirement to show a reinvestment TEA for a pre-RIA investor would be what was required pre-TEA, when a state designation was required for high unemployment area (HUA). States are not in the "business" of designating HUA TEAs anymore. Thus, unless USCIS clarifies that post-RIA HUA standards could be used, re-investment may need to be in a rural area, whose definition did not change with the RIA.

What Conclusions Can Be

Drawn from IIUSA's Revelatory New EB-5 Data?

Coleen Danaher
Regional VP/Director - ICS | JTC

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At a groundbreaking webinar, panelists broke down the never-before-seen data obtained through FOIA requests and discussed how Regional Centers and investors should respond

One of the most frustrating things about working in EB-5 is the lack of communication from USCIS. Without consistent, accurate data on things like adjudication times, visa availability, and the status of specific countries and visa categories, it can be hard for stakeholders to make informed decisions. Thankfully, IIUSA has decided to do something about it, and at a recent webinar, we got a glimpse of the data that has been unearthed.

On October 2nd, 2024, IIUSA and **JTC** hosted **"Post-RIA I-526/E Data Trends: Filings, Adjudications, and Processing Times,"** a virtual event that offered a first glimpse at some of the data obtained through IIUSA's membership survey as well FOIA requests that obtained data straight from USCIS.

"Having real data helps me to advise people on realistic, reasonable timeframes that they can expect to go through this process," said **Brandon Meyer** of Meyer Law Group, who participated in the FOIA request efforts.

While the panel couldn't cover all the information included in the report, there were a few things that stood out because they may affect the behavior of EB-5 investors going forward.

VISA AVAILABILITY AND DEMAND BY COUNTRY

One of the slides presented at the webinar covered post-RIA I-526E & I-526 case filing and adjudication trends organized by country and investment category from FY2022 through the first three quarters of FY2024. The data was broken up into three major groups: China, India, and Rest of the World, groupings that made sense to the panelists.

"China and India have historically always been the biggest markets," said Christine Chen, COO of CanAm Enterprises.

"Over half the filings in those years are from Chinese investors," added IIUSA Director of Policy Research & Data Analytics **Lee Y. Li**, who noted that for China and India, "we have more filings in the first three quarters of FY2024 than in the entire year of FY2023," signaling an incredible rebound from the pre-RIA lull.

Suzanne Lazicki of **Lucid Professional Writing** gave her thoughts on whether there was concern about any country being in danger of hitting the country cap of 7% of available visas.

"7%, once you get into EB-5 categories, is really small," said Lazicki. However, most countries don't have much to worry about. ***"Every year since 2005, basically, it's been the same four countries: China, India, Mexico, and the Philippines."***

That 7% country cap applies to all available visas, not just EB-5, and while Mexico and the Philippines use up a lot of other available visas, they shouldn't be in danger of hitting 7% in EB-5. But what about China and India?

"That depends on if other people are using the rest of the 86%," she cautioned.

THE EFFECT OF CONCURRENT FILING

Meyer said that based on his experience, the data for India includes a large number of applicants taking advantage of the RIA's provision for concurrent filing of adjustment of status.

"I would estimate that less than 5% of this number are people that are actually filing from India," he said. ***"The vast majority are here in the United States on F-1 student visas and H-1Bs."***

"Their decision-making process is a little bit different from investors coming from their home countries," said Chen, who noted applicants living in the U.S. may be less incentivized to pursue set-aside categories (which offer priority processing) because they're already in the country and able to work thanks to concurrent filing.

The panel discussed the idea that concurrent filing may also lower the average family size (and therefore the average number of visas per I-526 application) because concurrent filing is driving applications from younger petitioners who are single or parents of U.S.-born children.

"That has a very positive effect of lowering the overall visa demand, and that's delaying the potential of retrogression," said Meyer. The panelists also said concurrent filing may lessen concerns about retrogression among investors because they'll be able to pursue work opportunities while they wait. That said, retrogression is still a major concern, and thanks to the new data, we have some idea about when it might affect set-aside categories.

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THE STATUS OF RURAL AND HIGH-UNEMPLOYMENT RESERVED CATEGORIES

One of the biggest questions since the RIA was passed has been how soon set-aside categories might fill up. Until now, there hasn't been accurate data on the number of pending applications, but thanks to this new information, we have some idea. As Suzanne Lazicki pointed out at the webinar, carryover visas from 2022 and 2023 have prevented retrogression thus far, but that isn't likely to last.

"Think of market size in terms of how many visas are available," said Lazicki. While there are high-unemployment visas available now, once carryover visas are gone, the per-year number could be insufficient to meet demand. ***"This number is not going to leave many on the table,"*** she said.

Li walked the audience through filings organized by category, noting that while rural investments have increased from China and India, the rest of the world hasn't caught up, and overall, ***"high unemployment still accounts for the majority of filings."*** Regional Centers are well aware that since high-unemployment could reach its 10% limit, the 20% allocation for rural visas will become even more important.

"It's the largest category for set-aside visas and therefore the most appealing," said Chen.

"There are twice as many rural visas as high-unemployment visas," agreed Lazicki ***"We need to see these numbers of rural filings be twice high-unemployment or people aren't going to be getting visas."***

One reason rural filings have lagged behind high-unemployment filings may be that it has taken a while for Regional Centers to adjust to the particulars of rural development.

"A lot of regional centers had to kind of pivot to find rural projects," said Chen.

Even once more rural projects get going, several of the panelists doubted we'll ever see a 2:1 ratio of rural to high-unemployment simply because urban projects are seen as safer from a financial standpoint.

This became a larger topic of discussion during the webinar's second hour, when Meyer talked about how he might advise clients intent on rural projects because of their faster processing times.

"You're saving roughly four months over a five-year process," he said, pointing out that ***"this is still an $800,000 investment."*** Meyer said investors should approach evaluation with ***"a holistic perspective beyond processing times."***

"There's just a multitude of factors that investors should be considering before making a decision," said Chen, ***"and the better data and information they have, the better informed they are to make that decision."***

The data from the webinar's second hour did validate the fact that rural projects and investor petitions are, on average, getting approved more quickly, though that doesn't guarantee an individual investor will see the best case scenario.

"It does show very clearly that they are doing priority processing for rural," said Lazicki.

"It's good to see that the aims of the program are being carried out," said Chen.

Lazicki reiterated that high-unemployment projects may stop being as attractive once the carryover visas dry up.

"This is three years' worth of high-unemployment visas and two years' worth of rural visas just in the first months of 2024," said Lazicki. ***"We need to get visa relief."***

"The program is popular," agreed Li. ***"The visas are not enough."***

WHAT THIS MEANS FOR THE INDUSTRY AND IIUSA'S CONTINUING WORK

Retrogression is always on the minds of industry stakeholders, especially those working with Chinese and Indian investors who've been able to invest in set-aside categories since the RIA.

"It's not a question of if there's retrogression, it's when there's retrogression, what it looks like," said Lazicki. ***"I don't think it can happen in 2025 with this low number of applicants."***

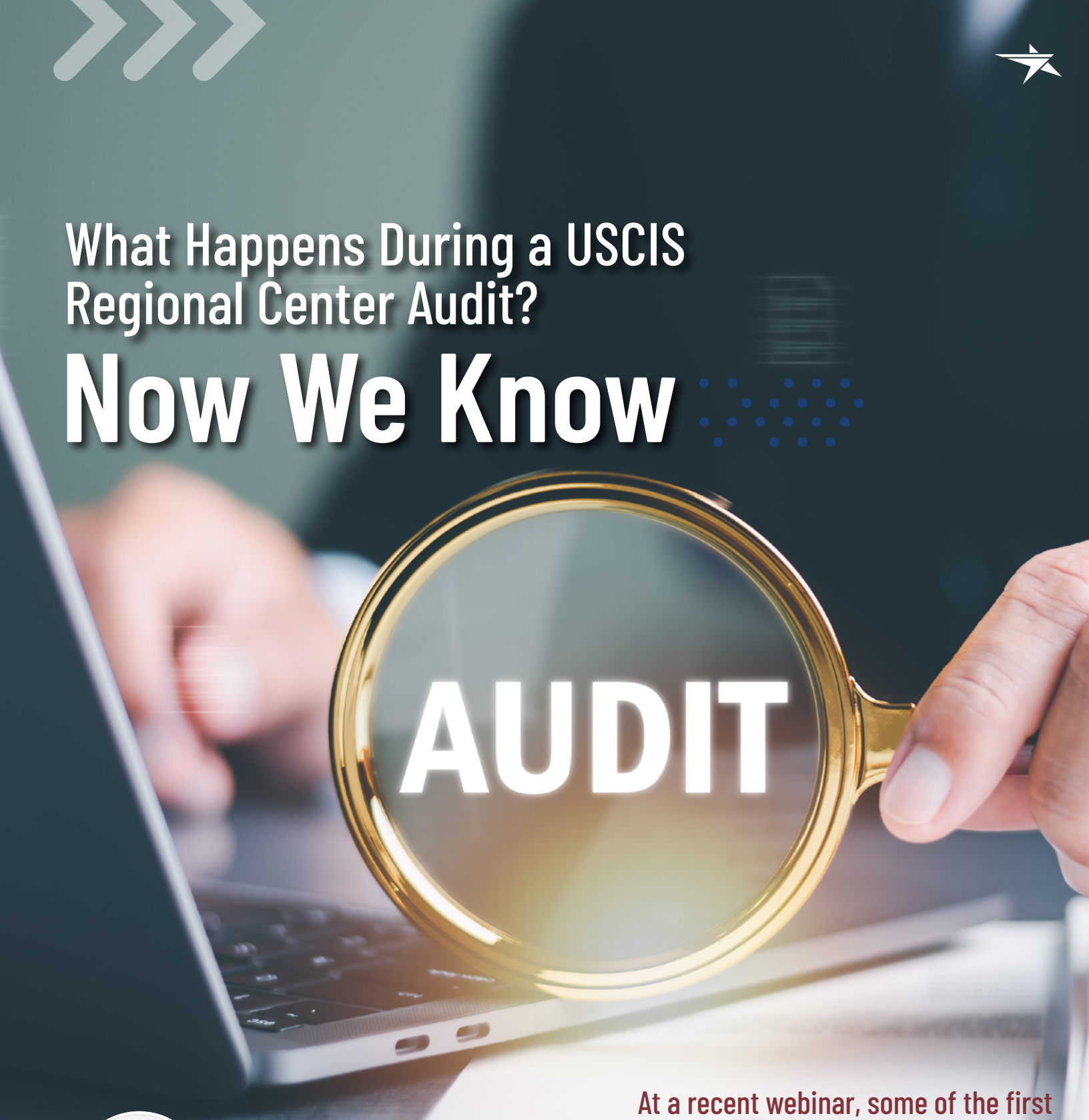
"If something's available to you today, take it," said Meyer, ***"because it might not be available tomorrow."***

Li discussed how IIUSA's work to compile the best possible EB-5 data will continue, and suggested ways Regional Centers can take part. One thing the panelists could all agree on was the value of this information.

"Having this kind of data available in real time allows the industry to hold USCIS accountable," said Chen. ***"It really points to a picture of the kind of information we as an industry can provide to help our clients and help each other."***

What Happens During a USCIS Regional Center Audit?

Now We Know



Laura Kelly
Director - Specialty Administration | JTC

At a recent webinar, some of the first people to experience USCIS audits shared their experiences and how Regional Centers can prepare.

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Ever since U.S. Citizenship and Immigration Services (USCIS) announced on April 9th, 2024, that it would finally commence with the Regional Center audits mandated by the EB-5 Reform and Integrity Act of 2022 (RIA), industry stakeholders have been looking for insight into how the audit process would actually be carried out.

To help Regional Centers better understand what to expect, IIUSA and JTC gathered a panel of individuals who were among the first to experience USCIS audits for an online event titled, **"Regional Center Audits: What Should You Do To Prepare?"** The panel shed light on how the process works, what was asked of them, and how they'd advise those preparing for future audits.

THE AUDIT PROCESS

STEP ONE: WRITTEN NOTICE AND REQUEST FOR DOCUMENTATION

The first step in the audit process is a written notification. According to Darrell Sanders, Vice President – Investment Programs for American Life Inc. and IIUSA Director, this communication actually came in the form of two letters, the first being a notice of audit and the second "about two pages of documentation that they wanted us to send them," including "financial statements, staff lists and information about the owners in the Regional Center."

Sanders and Noreen Hogan, President of CMB Regional Centers and Vice President of IIUSA, shared similar experiences of audits for companies with more than one Regional Center. Sanders said American Life owns multiple Regional Centers, but only two received audit notices, and while CMB has 19 Regional Centers, the audit was only related to one.

Hogan's first piece of advice was that when you receive a notice, "look at the timeframe, because it is a lot of documents." In CMB's case, they had "two weeks and a day" to prepare what ended up being just shy of 2,500 pages.

The panel included those working under an equity model, a loan model, and a rent-a-center model. So far, it seems USCIS is asking for the same information regardless of the model being employed.

"To USCIS, it's same, same, same," said Jill Jones, General Counsel, JTC, and moderator at the event.

"I'm not sure that there's a distinction at all between what a rent-a-center needs to do or should do and what a regular or traditional, if you will, regional center would do," said Ozzie Torres, Shareholder, Torres Law, and IIUSA Editorial Committee Chair. *"Maybe the preparation is slightly different, maybe some of the documentation is different, but ultimately what USCIS is looking for is going to be consistent, which is probably a good thing."*

"It was surprising how fast they wanted this back," said Sanders. *"If you're not prepared, you've got two weeks to get 2,000 pages together."*
"Two weeks, for a rent-a-center that may not have its game together, is a short period of time to produce all that flow of funds stuff," said Torres, stressing the need to prepare for an eventual audit before your name is called.

STEP TWO: VIRTUAL MEETING AND ADDITIONAL DOCUMENTATION

The next step is a virtual meeting with the auditors, held over Microsoft Teams. It appears the team for each audit will be different, and can include a range of expertise when it comes to EB-5, banking regulations, source of funds, and other topics. One thing the panelists noticed was that the auditors were as new to this process as they were.

"You could tell from the conversations that they were still trying to work it out too," said Sanders. *"This was the auditor's first audit."*

Among the things some auditors needed to be educated about were the specifics of the models being used by each Regional Center.

"They were a little bit surprised when we said we were an equity model and some of the documents they had asked for don't exist," said Sanders.

After the virtual meeting, some additional information may be requested before the next step, a site visit and interview.

STEP THREE: IN-PERSON MEETING WITH AUDITORS

According to the panelists, auditors were flexible as far as the date the in-person audit would be scheduled.

"USCIS was very accommodating of scheduling it when all the key personnel that we wanted could be there," said Hogan, who noted that the size of the team from USCIS – and the individuals who attend the meeting – may differ from the initial call. In fact, she said, only one person from USCIS was a part of both their initial virtual meeting and in-person audit.

Both Sanders and Hogan said their Regional Centers took the extra step of preparing PowerPoint presentations about their ownership, staff, and current projects.

"They actually thanked us for it," said Sanders. *"It kind of just got the conversation going."*

The in-person meetings involved discussions with specific staff members and went in-depth on movement of funds and how documents are secured.

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"It includes things like the formation of the entities and the governance of those entities as well as, operationally, what is the flow of funds and how do you track it and things like that," said Jones.

Auditors wanted to be walked through the use of investor-facing software platforms as well, and asked about third-party fund administration. According to Hogan, the auditors pre-selected specific Limited Partners and asked to go through their flow of funds information.

"They wanted to see bank statements, letters documenting movement of funds from one place to another, so it was really all about the flow of funds and auditing that for random Limited Partners," she said.

"They had selected transactions and investors to drill down on," said Sanders. *"I left day one with some homework,"* he added, but said the process went well enough that the auditors *"did not have to come back on day two."*

STEP FOUR: WHAT COMES NEXT?

While the panelists were at different stages of the audit process, those who'd completed their audits had yet to hear back about the results. USCIS has made it clear that refusal to comply with an audit can lead to termination of a Regional Center, but it's not clear what other adverse consequences may come from a failed audit.

"We know that if you are just being an obstructionist, that's bad," said Torres. However, *"there's not necessarily adverse consequences from getting dinged at an audit."*

Overall, the panelists stressed that preparation is key, and if proper compliance procedures are in place, there's nothing to worry about.

"If you're running your Regional Center as a true EB-5 business and this is what you do for a living, most of the documentation that they're asking you for" should be things you already have and potentially have already provided to USCIS, said Hogan.

"Be in contact with your fund administrators to get those records," said Jones. *"Invite them to your audits so they can show the screenshots. This is part of the service that you've hired us to do. Make sure you take advantage of that."*

"If you're expected to have it, it shouldn't be a panic," agreed Torres. *"Now's the time to prepare, until you get your letter"*

"At the end of the day, it's about integrity," concluded Jones. *"Ultimately, what we want is for the EB-5 program to be authorized permanently. This is a good program, and the only way to get it to be a permanent program is to show that it is doing the good that it's intended to do."*

Navigating EB-5 Compliance:

Fund Administrators vs. Annual Audits

Clem Turner
Chief Legal Officer | PRXY CO

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The Reform and Integrity Act of 2022 (RIA) promulgated several new requirements for the operators of regional centers and new commercial enterprises (NCEs or EB-5 Funds) who raise money under the EB-5 Program. One key reform in Section Q of the RIA bolsters transparency and compliance by establishing EB-5 Fund Administrators. EB-5 Funds are required to either retain (i) an EB-5 Fund Administrator or (ii) an accountant to audit their annual books.

This article will examine the pros and cons of these options and offer insights to EB-5 Fund managers as they choose between them. Since compliance is critical in this industry, the choice between an annual audit and a fund administrator can greatly affect both regional centers and investors.

PROACTIVE COMPLIANCE V. RETROACTIVE REVIEW

Section Q tasks fund administrators with confirming that every disbursement flowing out of the EB-5 Fund is compliant with the fund's offering documents (e.g., Private Placement Memorandum, Business Plan, Economic Analysis) and governing documents (e.g., LLC Operating Agreement or Limited Partnership Agreement). Fund administrators must also be a co-signatory on the EB-5 Fund's escrow and/or operating bank accounts and digitally approve all disbursements before funds are released.

The United States Citizenship Immigration Service (USCIS) reviews and approves an EB-5 Fund's offering and governing documents in connection with its I-965F application. If an EB-5 Fund adheres to its USCIS approved plan for job creation, compliance issues should be minimal when investors seek to remove conditions from their conditional green cards, via the I-829 filing. Thus, a fund administrator provides "statutory guardrails" that help an EB-5 Fund remain compliant.

However, unexpected challenges can arise once development on the job-creating enterprise (JCE or Project) begins. Developers may need to make adjustments, which can lead to compliance risks if the changes materially deviate from the USCIS-approved plan. In these cases, a capable fund administrator can identify potential issues before problematic expenditures are made and collaborate with the project developers, fund managers, and attorneys to find a compliant solution.

On the other hand, auditors review a year's worth of expenses to confirm that funds were spent in line with the EB-5 Fund's financial records. While auditors are well-versed in Generally Accepted Accounting Principles (GAAP), they may lack the immigration expertise needed to determine if an expenditure meets the job creation requirements of the EB-5 program and/or is consistent with the documents in the I-956G. For instance, if the NCE and JCE are affiliated, an auditor may not know that a construction consultant's verification is required for all EB-5 Fund expenditures. Typically, auditors are not conducting a review that considers the underlying immigration compliance of a Fund's expenditures.
Even if an accounting firm is familiar with the immigration issues surrounding an EB5 Fund audit, if they discover a problem, they will be raising issues after the money has been spent and fixing the issue could be difficult.

EASIER COMPLIANCE WITH REGIONAL CENTER AND INVESTOR FILINGS

In addition to approving disbursements, fund administrators collect and maintain written evidence that trace the flow of funds throughout a project's life cycle. They also retain documentation verifying that expenditures were disbursed into and utilized by the Project, such as third-party invoices. This allows fund administrators to generate a "Job Creation Report" detailing all of an EB-5 Fund's job creating expenditures, accompanied by all relevant supporting documentation.

Under the RIA, every regional center must submit an I-956G filing each year, reporting its annual activities to USCIS. The I-956G requires information on each EB-5 Fund, including the following:

- **Total EB-5 capital invested into the Project**
- **Evidence that investor capital has been fully committed to the Project**
- **Documentation of the Project's progress; and**
- **Evidence of Job Creation**

The Job Creation Report produced by fund administrators can satisfy items (i), (ii) and (iv) above and partly addresses item (iii), making it easier for regional centers to complete their I-956G filings.

Similarly, each investor must submit evidence with their I-829 application to remove conditions from their green card, showing that their investment created at least 10 jobs. Again, the Job Creation Report can provide evidence that (i) investor money flowed into the Project, (ii) it was deployed by the Project in a compliant expenditure and (iii) at least 10 jobs were created as a result.

EASIER COMPLIANCE WITH REGIONAL CENTER 5-YEAR AUDIT

The RIA requires that every regional center must undergo a comprehensive audit by USCIS at least once every five years. The 5-year audit involves a higher level of scrutiny than the annual audit discussed in this article. USCIS requests numerous documents in connection with its audit including:

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- Investor Subscription Agreements
- Wire transfer confirmations tracing the flow of funds per investor for the complete project life cycle (i.e., from Escrow to NCE to Project)
- Monthly bank statements for all NCE's and affiliated JCE's for 24 months
- methods utilized to track investor data, investments, and investment performance

In contrast, relying solely on an NCE's annual audit for the regional center's five-year audit may not be sufficient. Auditors generally review wire transfers and bank statements but are not equipped to produce a comprehensive Job Creation Report. This means that EB-5 fund managers using an auditor may face challenges in gathering all the necessary documentation for the USCIS audit within the two-week deadline.

Indeed, USCIS requests many documents during its audit process that are unrelated to fund administration (e.g., the history of the center, organizational charts, marketing plans, investor communications, etc.). However, EB-5 Fund managers benefit from being able to outsource a significant portion of the USCIS audit document production if they use a fund administrator instead of an auditor.

POTENTIAL MARKETING BENEFITS

Some Fund Administrators and other professionals have been touting the benefits of retaining a fund administrator over an auditor. Fund administrators provide proactive guardrails that help deter fraud, maintain immigration compliance and facilitate the drafting of the investor's I-829 filing.

This is a compelling case for EB-5 fund administration that fund administrators have been taking overseas to agents and investors directly. We believe that migration agents/investors are beginning to take notice of whether a fund administrator has been retained by an EB-5 Fund, and some have even requested the client list of EB-5 fund administrators.

Admittedly, there is only anecdotal/testamentary evidence at this time that a marketing benefit might exist. While this potential marketing benefit is still largely unproven and should not be the primary reason for choosing a fund administrator, it is something EB-5 Fund managers can consider when evaluating their options.

SELECTING THE RIGHT FUND ADMINISTRATOR

There are several EB-5 Fund Administrators available, but it is important to select one that aligns with your specific needs. When evaluating fund administrators to determine if they can provide all the benefits outlined in this article, here are key questions to ask:

- What is the experience level of the principals? Are they familiar with EB-5 and Section Q of the RIA? Do they have relevant backgrounds in immigration, real estate, or corporate law?
- Are they compiling records for both the regional center's I-956-G filing and five-year audit and the investors' I-829 filing requirements?
- Is their system user-friendly and compliant with statutory guidelines?
- Do they understand your business concerns while minimizing operational disruption, including quick onboarding, reasonable fees, fast disbursement approvals, and seamless banking integration?

CONCLUSION

While both fund administrators and auditors fulfill the compliance requirements of the RIA, they offer very different services and benefits. Fund administrators provide more proactive support by monitoring fund disbursements and ensuring compliance throughout the project's lifecycle. This can prevent issues from arising, rather than addressing them after the fact, as is the case with annual audits.

Given that fund administrators and auditors are typically comparable in price (unless USCIS requires a more extensive audit of the JCE, which is far more expensive), EB-5 Fund managers should carefully weigh the pros and cons of each option. By prioritizing proactive compliance and considering the broader regulatory benefits, EB-5 Fund managers can set themselves up for success in this evolving landscape.

EB-5 Investors are Realizing

They Shouldn't Just Leave Compliance up to Regional Centers

Jill Jones
General Counsel | JTC

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The RIA's innocent investor protections only do so much, making full transparency crucial to easing investor worries.

Among the updates in the **EB-5 Reform and Integrity Act of 2022** (RIA) was a series of **innocent investor protections** to ensure investors could redeploy into qualifying projects in the event of Regional Center termination or other sanctions. This was a win for investors, who don't deserve to have their immigration petitions jeopardized by violations they had no knowledge of.

In 2023, USCIS **released guidance** clarifying the minimum sustainment period as only two years, eliminating much of the need investors used to have for redeployment. But if a Regional Center is terminated or the principals of the JCE sanctioned before the investment creates the requisite jobs, investors will have to redeploy to a new project.

The RIA's innocent investor protections ensure the actions of sanctioned parties won't affect investor petition status: if they've already created ten jobs and been at risk for two years, they won't have to redeploy. If they haven't, then their Regional Center can find them a new project; or, if it's the Regional Center that's been sanctioned, the JCE can affiliate with a different Regional Center… right?

If only it were that simple. The Regional Center and JCE could both be subject to sanctions, the Regional Center could be unable to find a new project, or the JCE unable to find another Regional Center. Investors may have to try to recoup what capital they can and invest in a new project with an entirely different Regional Center within 180 days. Investors would rather do this than start over from square one, but the better solution is to avoid the situation entirely by demanding full transparency and oversight from Regional Centers.

WHAT HAPPENS WHEN A REGIONAL CENTER IS SANCTIONED

USCIS has updated **the section of its Policy Manual** that deals with sanctions, which are divided into categories for suspensions, terminations, and debarments. Each of these involves different penalties and affects investors differently.

If a Regional Center is terminated, investors will receive a notification, after which they will have "180 days to reassociate with a new regional center or new commercial enterprise." Debarment will likely involve the same notification and opportunity to redeploy, but could put investors in an even more difficult spot because if their contact for the project is permanently banned from participating in EB-5, they can't use that contact to find a new project, potentially forcing them to start over, having to find a new agent, Regional Center, and project within 180 days.

The good news for investors is that the RIA gives them the ability (and the time) to redeploy into a new project. What the law can't do is guarantee capital will be returned so it can be redeployed. Getting back some or all of the originally-invested capital may be impossible if fraud has been perpetrated, and without proper administration, investors may not be able to count the jobs that have already been created or the time already at risk.

WHAT USCIS HAS SAID ABOUT REDEPLOYMENT WHEN A PAPER TRAIL IS LACKING

In May 2024, USCIS updated its **"General Questions and Answers"** with information regarding how immigrant investors might be affected by Regional Center sanctions. Question 8 reads:

If there is evidence of fraudulent activity with a project (e.g., misappropriation of funds, misuse of investor capital), can an I-829 petitioner still demonstrate eligibility for removal of conditions on permanent resident status?

It depends on the facts of the case. In all cases, IPO will evaluate the evidence to determine whether the I-829 petitioner has satisfied all investment, sustainment and job creation requirements under 8 CFR 216.6(c). There are times when the fraudulent activity may have a bearing on the I-829 adjudication. For example, depending on the facts of a particular case, a project determined to be fraudulent may undermine the petitioner's ability to demonstrate the job creation under 8 CFR 216.6(c)(iv).

If the petitioner can prove they have satisfied all investment, sustainment, and job creation requirements, they would not need to redeploy. However, if the reason for termination is fraud, investment and job creation information may be unreliable or nonexistent. In that case, the petitioner might not be able to count those jobs and would have to start over with a new project.

Another scenario is one in which the petitioner can prove the investment was made, put at risk, and created jobs, but hadn't fully satisfied all requirements. What if some jobs have been created, but not all ten required jobs?

In theory, they could count the jobs already created and would only need to create the remaining required jobs in the new project. But again, this requires the original Regional Center, NCE, and JCE to properly document the investment and job creation. How can investors make sure their projects are doing so correctly?

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HOW INVESTORS ARE PROACTIVELY GUARDING AGAINST SANCTIONED PROJECTS

The Q&A states that "If, at the time of adjudication, events described in the business plan have (or should have) already come to pass and the claimed jobs have been created, an officer may seek evidence related to those jobs for purposes of demonstrating continued eligibility." Regardless of the project or Regional Center's status, the petitioner could be asked to provide the required information at any time.

It is on the investor to provide this information, and if their Regional Center has done a poor job of tracking this information, the investor will be unable to provide it. That's why fund administration is a critical part of the RIA.

The RIA requires Regional Centers to use a third-party fund administrator to "monitor and track any transfers" and verify these transfers comply with all governing documents. The fund administrator must also "periodically provide each alien investor with information about the activity of the account in which the investor's capital investment is held" and "any additional information required by the Secretary."

Regional Centers can forego fund administration by obtaining a waiver if they submit to an annual audit, but an annual audit won't provide investors with the information they need if something disrupts communication with the Regional Center. Real-time tracking of job creation allows investors to quickly respond to requests for evidence, and a fund administrator that keeps records and makes them easily accessible ensures investors can access those records to figure out where their investment is and how many jobs were created with it.

For immigrant investors, information regarding sustainment and job creation can be more important than money, and they can't afford to lose this vital proof in the event of an issue with their Regional Center. If they invest with a Regional Center that works with a third-party fund administrator, then in the event of termination, the investor can go to the fund administrator to get the information they need.

Using third-party fund administration is a valuable best practice for Regional Centers. It offers transparency investors can appreciate and highlights Regional Centers' commitment to keeping their investors informed and secure. EB-5 investors have a lot of projects to choose from, and doing the minimum may not be enough to stand out. While many projects can boast of using a fund administrator or performing an annual audit, those that do both will be demonstrating their willingness to go above and beyond.

The best issuers and projects have nothing to hide. The more investors see that the best projects offer full transparency, the more the cream will rise to the top: the best Regional Centers will continue to attract investment, and those that can't prove their trustworthiness will fall away.

Latest Data on I-526E and I-526 Filings, Adjudications and Withdrawals:

Country-Specific Trends in EB-5 Demand, Investment Preferences, Case Processing, and Reserved Visa Waitlists

Lee Y. Li
Director of Policy Research and Data Analytics | IIUSA

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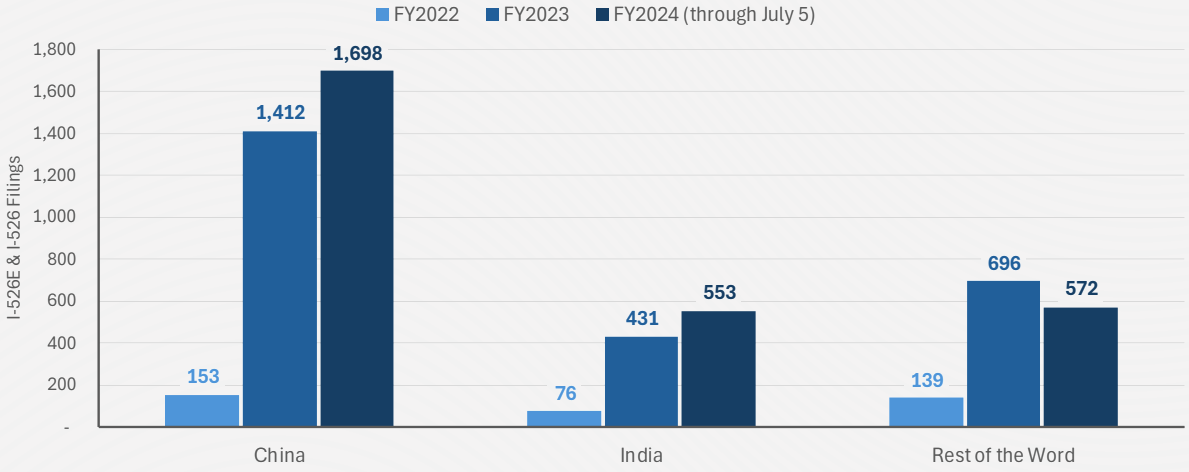
IIUSA has been proactively seeking data through the Freedom of Information Act (FOIA) to inform the EB-5 industry of the latest developments. Thanks to the professional assistance from IIUSA member, the Meyer Law Group, we recently obtained a comprehensive dataset of I-526E and I-526 petition filings and adjudication statistics from October 1, 2022 (FY2022) to July 5, 2024 (FY2024), broken down by:

- **Investor's country of birth:** China, India, and Rest of the World;
- **Investment category:** High Unemployment Area (HUA), Rural Area, and Unreserved/Unknown;
- **Adjudication status:** approved, denied, and withdrawn.

Recently, IIUSA published an in-depth report that provided a comprehensive analysis of the latest I-526E and I-526 petition filings, adjudications, withdrawals, and visa demand trends from October 1, 2021 to July 5, 2024.[1] Overall, our analysis on the latest FOIA data highlights the following key insights on the new dynamics of various EB-5 markets, investment preferences, processing trends, visa demand projections:

Post-RIA EB-5 Filings Reach a New High in FY2024

Yearly I-526E & I-526 Petitions Filed by Country by Fiscal Year (FY2022 - FY2024*)



** FY2024 data through July 5, 2024*
Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

Surge in EB-5 Demand Post-RIA: Since the passage of the EB-5 Reform and Integrity Act (RIA), global demand for the EB-5 program has significantly increased, particularly in FY2023 and FY2024. A total of 6,506 I-526E and I-526 petitions have been filed, representing an estimated $5.2 billion in EB-5 capital investment.

[1] Full report is available on IIUSA website: https://iiusa.org/I526Etrends

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China and India Dominate Global Case Filings

Data Range: FY2022 - FY2024 (through July 5)

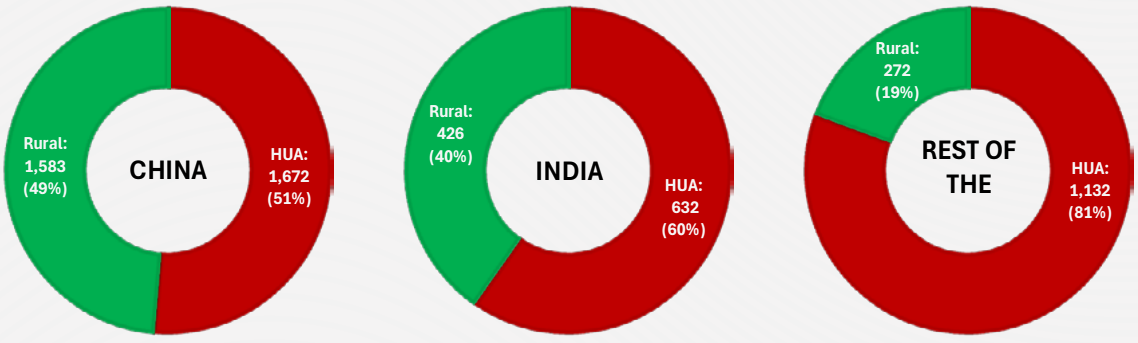
I-526E & I-526 Petitions Filed*	China	India	Rest of the World	Category Total**
High Unemployment Area	1,672	631	1,132	**3,435**
Rural Area	1,583	426	272	**2,281**
Rural & HUA	9	2	2	**13**
Unreserved/Unknown	*38*	*281*	*458*	***777***
Country Total**	**3,300**	**1,341**	**1,865**	**6,506**
Country Share	51%	21%	29%	-

** Distribution of I-526 data is based on I-526E by investment category.*
*** Margin of errors: +/- 10%*
Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

China and India Lead Filings: China continues to dominate the EB-5 market, accounting for 51% of global filings (3,300 petitions). India is the second largest market, contributing 1,341 case filings (20% of total case filings worldwide), with 1,057 of these under the Reserved EB-5 categories. The Rest of the World (ROW) accounts for 29% of filings.

High Unemployment Area Project Lead Case Filings

Total EB-5 Filings by Investment Category: Rural vs. HUA (FY2022 – FY2024*)



Data Range: FY2022 - FY2024 (through July 5)
Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

Investment Preferences:
High Unemployment Area (HUA) projects lead in filings across all regions. However, China's filings show a nearly even split between HUA (51%) and rural investments (49%). In contrast, Indian investors show a stronger preference for HUA projects, and ROW investors show an even greater inclination, with 81% of the case filings associated with the HUA category.

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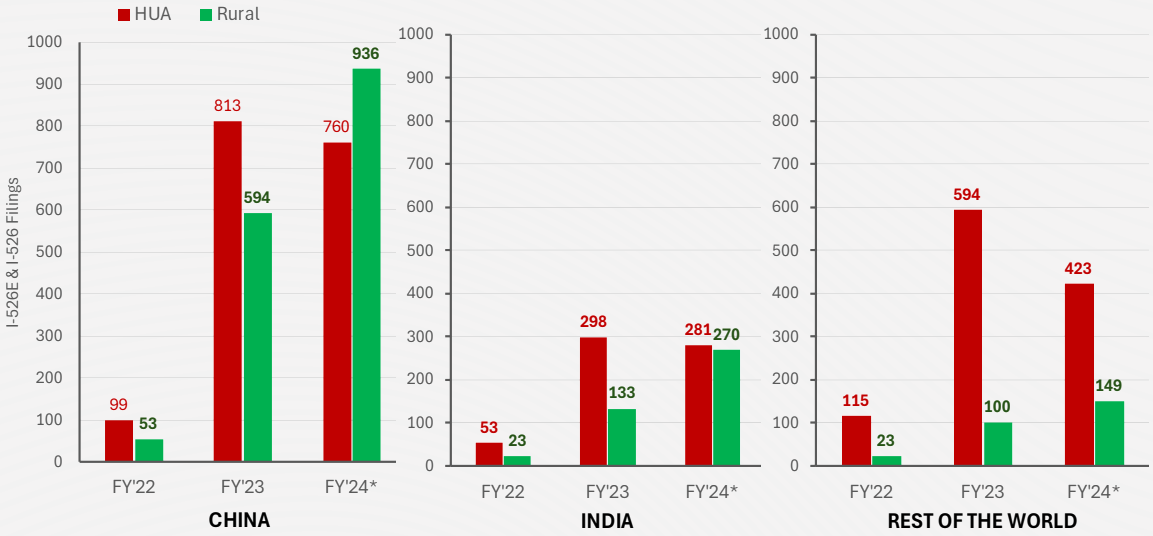
Rapid Growth in Case Filings Assocated with Rural Projects

Annual EB-5 Filings by Investment Category by Project Type (FY2022 - FY2024*)



** FY2024 data through July 5, 2024, excluding 14 I-526/E cases filed for both HUA & RA.*
Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

Rural Filings Growth: Rural filings have seen substantial growth, particularly in FY2024. Among Chinese investors, rural filings surpassed HUA filings during the first three quarters of FY2024, with 936 rural petitions compared to 760 HUA petitions. Indian investors showed an almost equal interest in both rural and HUA categories in FY2024 (through July 5).

Fewer than 800 Cases Adjudicated, with the Majority Still Pending

I-526E Petition Adjudication Summary by Country oby Investment Category

Data Range: FY2022 - FY2024 (through July 5)

I-526E Petitions		# of Cases Approved	# of Cases Denied	Total # of Cases Adjudicated	Approval Rates	# (%) of Case Pending
China	HUA	66	9	**75**	88%	1,597 (96%)
	Rural	320	17	**337**	95%	1,246 (79%)
India	HUA	44	2	**46**	96%	586 (93%)
	Rural	91	1	**92**	99%	334 (78%)
ROW	HUA	130	7	**137**	95%	995 (88%)
	Rural	67	0	**67**	100%	205 (75%)
Cateogry Total	**HUA**	**240**	**18**	**258**	**93%**	**3,178 (92%)**
	Rural	**478**	**18**	**496**	**96%**	**1,785 (78%)**

Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

Case Adjudications: USCIS appears to be prioritizing rural case adjudications, with 65% of the 754 adjudicated cases associated with the rural category, despite HUA filings accounting for 60% of the total number of cases received by USCIS. Approval rates of I-526E cases were high between FY2023 and FY2024 (through July 5), with rural cases at 96% and HUA cases at 93%. However, the overall adjudication volume remains low, resulting in a significant backlog of pending cases — 92% of HUA cases and 78% of rural cases on file were still awaiting adjudication.

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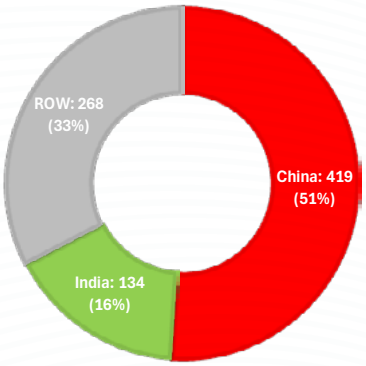
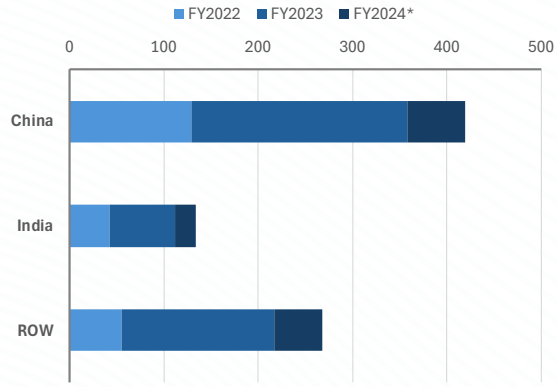
820+ I-526 Petitions have been Withdrawn from USCIS

I-526/E Case Withdrawals by Country and by Fiscal Year (May 15, 2022 – January 31, 2024*)

Data Range: May 2022 - January 2024



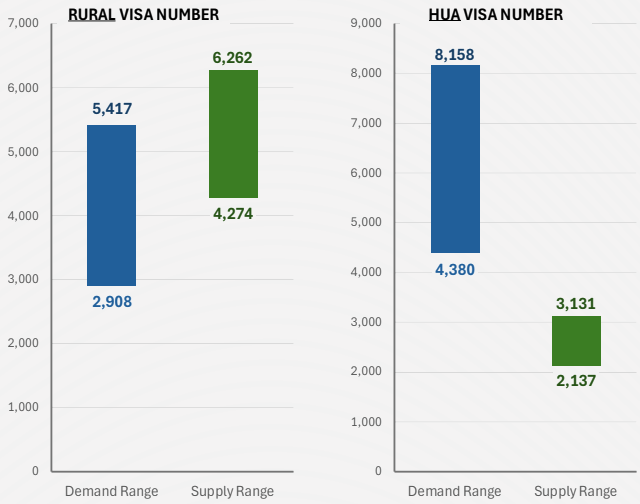


** FY2024 data missing November 2023*
Source: U.S. Citizenship and Immigration Services (USCIS).
Prepared by: IIUSA

Withdrawals: At least 821 I-526 petitions were withdrawn between May 2022 and January 2024. Chinese investors represent the majority of withdrawals (51%), likely due to processing delays, visa retrogression, and the option to refile under new RIA benefits.

Visa Demand vs Supply for Rural & HUA

Projected Visa Demand Range and Visa Supply Range based on I-526E Cases on File



* Based on I-526E and I-526 cases filed through July 5, 2024
Data: Author's Calculations
Prepare by: IIUSA

Visa Demand and Supply: Projections indicate that the rural visa supply is likely to still meet visa demand in FY2025 and FY2026, reducing the likelihood of a cut-off date. However, our estimated demand for HUA visas is expected to far exceed the current visa supply for the HUA category, raising concerns about potential cut-off dates. This will largely depend on various unknown factors, such as petition approvals, visa interview scheduling, family size, and visa processing decisions by petitioners with approvals for multiple visa categories.

The full report serves as a vital resource for understanding current trends and potential future challenges within the EB-5 market, providing stakeholders with data-driven insights for strategic planning and decision-making. IIUSA continues to collect the latest statistics on this topic and will publish additional analyses once new data is available.

IIUSA would like to express our sincere gratitude to our member **Brandon Meyer** and the team at the Meyer Law Group for their support in helping us secure this comprehensive set of invaluable data. This in-depth analysis would not have been possible without their professional assistance.

A QUICK AND EASY DIGITAL TOOL TO MASTER THE BASICS OF EB-5

LEARN ABOUT

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- **The EB-5 immigration process**
- **Regional Center operations**
- **Economic impact**
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IIUSA established the first and only political action committee (PAC) focused exclusively on federal issues and candidates that support EB-5 visas and the Regional Center Program.

IIUSA PAC

If you'd like to learn more about the IIUSA PAC and how to participate, visit **iiusa.org/pac** or email **info@iiusa.org** for more information.

SAVE THE DATE

2025 IIUSA EB-5 Industry Forum Heading to Space City

IIUSA is excited to announce the 2025 EB-5 Industry Forum will be held in Houston, TX April 28-30. This is a special occasion for the association as we celebrate our 20th Annual Meeting and 15th Annual Industry Forum!

We are honored to have the support of our Host City Sponsor, Houston EB5, who will welcome us to their recently completed Thompson Houston project.

EARLY BIRD TICKETS ON SALE NOW!

Email info@iiusa.org if you are interested in getting involved even earlier!

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